No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

MICHAEL O. LEAVITT, as Governor of the State of Utah; and JAN GRAHAM, as Attorney General of the State Utah,
Petitioners,

v.

JANE L., JANE F., and JULIE S., on behalf of themselves and all others similarly situated; et al.,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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February 1996

127 pp

QUESTIONS PRESENTED

1. Consistent with the state's immunity under the Eleventh Amendment, can the federal court of appeals invalidate, in its entirety and on the basis of severability, a state statute regulating abortion when the result is to enjoin state officials from enforcing the remaining, constitutional portions of a state law?

2. Consistent with *Planned Parenthood v. Casey*, can the federal appellate court rely on *Thornburgh v. American College of Obstetricians & Gynecologists* to invalidate a state statute that requires a physician who performs an abortion to use a procedure that gives a viable fetus the best chance of survival, so long as that procedure is consistent with preventing grave damage to the woman's medical health and does not create an undue burden on the woman's right to an abortion?

PARTIES TO THE PROCEEDING

This case was originally brought against Norman Bangerter, Governor of Utah, and Paul Van Dam, Attorney General of Utah, both of whom were in office in 1991. Their successors are Governor Michael O. Leavitt and Attorney General Jan Graham. Pursuant to Supreme Court Rule 35.3, the successors to the originally named public officers have been substituted as Petitioners here.

In addition to the parties listed as *Respondents* in the caption, additional respondents include: Utah Women's Clinic, P.C.; Planned Parenthood Association of Utah; Utah College of Obstetricians and Gynecologists; David Hansen, M.D.; Madhuri Shah, M.D.; John Carey, M.D.; Dan Chichester, M.D.; Kirtly Parker Jones, M.D.; Kathleen Kennedy, M.D.; Neil Kochenour, M.D.; Rhonda Lehr, M.D.; Claire Leonard, M.D.; and Kenneth Ward, M.D.; on behalf of themselves, and all others similarly situated; Wendy Edwards; Penny Thomas; Bonnie Jeanne Baty; Susan Elizabeth Lyons; Janet Lynn Wolf; Leslie McDonald-White; Reverend David Butler; Reverend Barbara Hamilton-Holway; Reverend George H. Lower; Reverend Lyle D. Sellards; Reverend Alan Condie Tull; Reverend Marie Soward Green; and Rabbi Frederick L. Wenger.

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In The

SUPREME COURT OF THE UNITED STATES

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MICHAEL O. LEAVITT, et al., *Petitioners,*

v.

JANE L., et al., *Respondents.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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Michael O. Leavitt, as Governor of the State of Utah, and Jan Graham, as Attorney General of the State of Utah, petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The court of appeals' opinion is reported at 61 F. 3d 1493 (10th Cir. 1995). A copy is attached as Petitioners' Appendix, pp. A-1 to A-28. The memorandum decision and order of United States District Court Judge J. Thomas Greene

is reported at 809 F. Supp. 865 (D. Utah 1992).[1] A copy is attached as Petitioners' Appendix, pp. B-1 to B-40.

JURISDICTION

The judgment of the Tenth Circuit Court of Appeals was issued on August 2, 1995. The court denied a timely petition for rehearing on November 6, 1995, in an order attached as Petitioners' Appendix, pp. C-1 to C-3.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Utah Code Ann. § 76-7-317 (1995)[2] states:

> If any one or more provision, section, subsection, sentence, clause, phrase or word of this part or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of this part shall remain effective notwithstanding such unconstitutionality. The legislature hereby declares that it would have passed this part, and each provision, section, subsection, sentence, clause, phrase or word thereof, irrespective of the fact that any one or more provision, section, subsection, sentence, clause, phrase or word be declared unconstitutional.

Utah Code Ann. § 76-7-302(2) and -302(3) state:

> (2) An abortion may be performed in this state only under the following circumstances:
>
> (a) in the professional judgment of the pregnant woman's attending physician, the abortion is necessary to save the pregnant woman's life;
>
> (b) the pregnancy is the result of rape or rape of a child, as defined by Sections 76-5-402 and 76-5-402.1, that was reported to a law enforcement agency prior to the abortion;
>
> (c) the pregnancy is the result of incest, as defined by Subsection 76-5-406(10) or Section 76-7-102, and the incident was reported to a law enforcement agency prior to the abortion;
>
> (d) in the professional judgment of the pregnant woman's attending physician, to prevent grave damage to the pregnant woman's medical health; or
>
> (e) in the professional judgment of the pregnant woman's attending physician, to prevent the birth of a child that would be born with grave defects.

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[1] The district court issued two earlier opinions in this case that are reported at 794 F. Supp. 1537 (D. Utah 1992) and 794 F. Supp. 1528 (D. Utah 1992). The issues addressed in these opinions are not at issue here.

[2] Unless otherwise noted, all statutory references are to Utah Code Annotated, 1995 Replacement Volume.

(3) After 20 weeks gestational age, measured from the date of conception, an abortion may be performed only for those purposes and circumstances described in Subsections (2)(a), (d), and (e).

Utah Code Ann. § 76-7-307 provides:

> If an abortion is performed when the unborn child is sufficiently developed to have any reasonable possibility of survival outside its mother's womb, the medical procedure used must be that which, in the best medical judgment of the physician will give the unborn child the best chance of survival. No medical procedure designed to kill or injure that unborn child may be used unless necessary, in the opinion of the woman's physician, to prevent grave damage to her medical health.

Utah Code Ann. § 76-7-308 provides:

> Consistent with the purpose of saving the life of the woman or preventing grave damage to the woman's medical health, the physician performing the abortion must use all of his medical skills to attempt to promote, preserve and maintain the life of any unborn child sufficiently developed to have any reasonable possibility of survival outside of the mother's womb.

STATEMENT OF THE CASE

In 1991, the Utah Legislature passed Senate Bill No. 23 entitled "An Act Relating to Abortion; Prohibiting Abortion Except Under Specified Circumstances." That bill, which amended Utah's abortion law, Utah Code Ann. § 76-7-302 (1990), included two separate provisions restricting abortion. First, subsection 76-7-302(2), applicable to abortions during the first twenty weeks of pregnancy, provides that abortions can only be performed in five defined circumstances. It was acknowledged by the State that this subsection would be challenged and that its validity would probably require this Court to overrule *Roe v. Wade*, 410 U.S. 113 (1973). *See* Utah Code Ann. § 76-7-317.1 (establishing an Abortion Litigation Trust Account).

In the second provision, the Utah Legislature adopted "after 20 weeks gestational age"[3] as the point in time after which an abortion could only be performed to protect the mother's life, to prevent grave damage to maternal health, or to prevent the birth of a child with grave defects. Utah Code

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[3] The medical community uses two methods for describing the elapsed length of a pregnancy: (1) menstrual age, measured from the first day of the last menstrual period (LMP); or (2) gestational age, measured from the date of conception. The Utah Legislature restricted abortions "[a]fter 20 weeks gestational age," measured from "the date of conception" and not from the point of last menstrual period, which is approximately two weeks earlier. The statute thus limits late "post-conception age" abortions. The statutory cutoff for most abortions, therefore, is **after** 20 weeks after conception, i.e., starting in the 23rd week of pregnancy measured by LMP. *Jane L. v. Bangerter*, 809 F. Supp at 869, Pet. App. at B-9.

Ann. § 76-7-302(3). This second provision, which regulates post-viability abortions, does not include the exceptions for victims of rape and incest that are included in the pre-viability regulations. The twenty-week cutoff was chosen as the point at which the State could impose additional restrictions on abortion consistent with *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 516 (1989) (upholding a statute that creates a presumption of fetal viability at twenty weeks and requires a physician to determine if the fetus is viable before performing an abortion on any woman more than twenty weeks pregnant).

Plaintiffs challenged all of the 1991 amendments to the Utah Abortion Act, as well as certain original sections of the 1974 Act relating to fetal experimentation that are not at issue here. In response, Defendants filed a Motion to Dismiss and a Motion for Partial Summary Judgment, seeking dismissal of all Plaintiffs' claims. After reviewing the relevant evidence presented by the parties, Judge J. Thomas Greene issued three opinions in this case, only the last of which is at issue here.[4] In the last opinion, Judge Greene held that the Act's restrictions on abortions prior to fetal viability are unconstitutional under the Joint Opinion in *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). *Jane L. v. Bangerter*, 809 F. Supp. 865, 870 (D. Utah 1992), Pet. App. at B-11. The State defendants had conceded this issue after *Casey* was decided. *Id.*

Judge Greene, however, upheld the second statutory prohibition, i.e., the regulation of nontherapeutic abortions after twenty weeks gestational age in subsection 76-7-302(3),

[4] *See* note 1, *supra.*

concluding it is not facially invalid. He further held that this provision limiting post-viability abortions is severable from the pre-viability ban in subsection 76-7-302(2) he had invalidated under *Casey*. 809 F. Supp. at 870, Pet. App. at B-14-15, 17. This conclusion is consistent with the Utah Legislature's express intention to regulate abortion "as permitted by the United States Constitution," H.R.J. Res. 39, 48th Leg., 1990 Utah Laws 1554-55,[5] reflected in the statute's severability provision, Utah Code Ann. § 76-7-317. Judge Greene also held that the subsection regulating post-viability abortions is constitutional and serves a legitimate legislative purpose under the *Casey* standard. 809 F. Supp. at 871-74, Pet. App. at B- 17-20.

On appeal, the circuit court reversed and held that the post-viability restrictions on abortion in subsection 76-7-302(3) cannot be severed from the unconstitutional pre-viability restrictions in subsection 76-7-302(2). *Jane L.*, 61 F.3d at 1499, Pet. App. at A-13. The court reached this conclusion even though the Utah Abortion Act includes an express severability provision, which states that any "provision, section, subsection, sentence, clause, phrase or word" held unconstitutional is severable. Utah Code Ann. § 76-7-317.

[5] This joint resolution, included here in Petitioner's Appendix, pp. E-1 to E-3, was adopted a year before the 1991 amendments to the Utah Abortion Act. It established a task force to study and recommend abortion legislation. H.R.J. Res. 39, 48th Leg., 1990 Utah Laws 1555. The Tenth Circuit erroneously cited to H.R.J. Res. 38, instead of 39; the material quoted by the court, however, is from Res. 39.

By determining not to sever the unconstitutional portions of the state statute, the federal court of appeals invalidated Utah's constitutional restrictions on late-term abortions in subsection 76-7-302(3). Whether the appellate court's reversal of the trial court's holding on severability is contrary to the express intent of the Utah Legislature and inconsistent with this Court's holding in *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984), is the first issue presented to this Court for review.

The second issue involves Plaintiffs' facial challenge to the choice-of-method provisions for post-viability abortions, as amended by the Utah Legislature in 1991. Utah Code Ann. §§ 76-7-307, -308. These provisions direct use of the abortion technique most likely to save the life of the unborn child when viability is reasonably possible, unless another abortion technique is medically necessary to save the pregnant woman's life or prevent "grave damage" to her health. The trial court held that these provisions are "facially valid" and bear "a rational relationship to the legitimate state interest in preservation of viable fetal life." In so holding, the district court concluded that this Court's decision in *Thornburgh v. American College of Obstetricians & Gynecologists,* 476 U.S. 747 (1986), is not controlling because, as noted in *Casey*, it cannot be reconciled with the holding in *Roe v. Wade* "that the state has legitimate interests in the health of the woman and in protecting the potential life within her." *Jane L.*, 809 F. Supp. at 875 (quoting *Casey*, 112 S. Ct. at 2817), Pet. App. at B-25.

The Tenth Circuit reversed, holding that *Thornburgh* controls and, thus, the Utah statutory provisions regulating the choice of abortion method are unconstitutional on their face. *Jane L.*, 61 F.3d at 1503-05, Pet. App. at A-23-

28. The correctness of this ruling and, specifically, the court's reliance on *Thornburgh* after *Casey* is the second question presented to this Court for review.

REASONS TO GRANT THE PETITION

I

A. By holding that the Act's constitutional restrictions on late-term abortion cannot be severed from the pre-viability restrictions held unconstitutional under *Casey,* the court of appeals erroneously exercised its power to annul an act of the Utah Legislature. The question of severability is a question of state law.[6] However, when a federal court's application of state law invalidates constitutional portions of a state statute, the Eleventh Amendment comes into play. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). When no constitutional authority is vindicated by the action of the appellate court, this Court should exercise its supervisory power to preserve the state's sovereign immunity under the Eleventh Amendment and to assure preservation of a state statute insofar as it is valid. *See id. at 107; see also Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985) (reversing the Ninth Circuit Court of Appeals' refusal to sever the invalid portion of Washington's moral nuisance law); *cf. Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) ("A ruling of unconstitutionality frustrates the intent of the elected representatives of the people. Therefore, a court should refrain from invalidating more of the statute than is necessary.").

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[6] *See Watson v. Buck,* 313 U.S. 387, 396 (1941).

The Utah Legislature carefully crafted a statute regulating abortion that would: (1) present a challenge to *Roe v. Wade* that might result in this Court's reversal of that decision; and (2) leave intact restrictions that are consistent with the United States Constitution and the decisions of this Court if *Roe v. Wade* was not overturned. The Tenth Circuit's ruling on severability put sole emphasis on the legislature's hope that this Court would review *Roe*. The court completely ignored the Utah Legislature's express purpose to restrict abortions to the extent it could under the Constitution and to sever any provision found unconstitutional from the valid portions of the Act. As a result, Utah is left with **no** statutory prohibitions on abortion, the exact opposite of the Utah Legislature's purpose and intent.

In the Utah Abortion Act, the Utah Legislature made it crystal clear that any provision found unconstitutional should be severed from the remaining portion of the statute:

> If any one or more provision, section, **subsection, sentence, clause, phrase or word** of this part or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of this part shall remain effective notwithstanding such unconstitutionality. **The legislature hereby declares that it would have passed this part, and each provision, section, subsection, sentence, clause, phrase or word thereof, irrespective of the fact that any one or more provision, section, subsection, sentence, clause, phrase or word be declared unconstitutional.**

Utah Code Ann. § 76-6-317 (emphasis added).

Under Utah law, the test for determining if an unconstitutional statutory provision can be severed from the remainder of the statute "is primarily a matter of legislative intent." *Utah Technology Fin. Corp. v. Wilkinson*, 723 P. 2d 406, 414 (Utah 1986). Intent is generally a question of "whether the remaining portions of the Act can stand alone and serve a legitimate legislative purpose." *Id.*[7] Inclusion of a severability clause "creates a presumption that [the legislature] did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision," absent "strong evidence" to the contrary. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1986); *see also Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919, 932 (1983) (unambiguous language of severability clause indicates clear intent that remainder of Act is to stand if any particular provision were held invalid).

Applying this test, the district court first found that the post-viability restrictions on abortions "are entirely separate from the pre-viability requirements, and can stand alone." *Jane L.*, 809 F. Supp. at 871, Pet. App. at B-14-15. The district court then found that the post-viability restrictions serve the State's legitimate interest in regulating abortion.

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[7] The standard applied by the Utah Supreme Court is similar to the standard applied by this Court. *See Buckley v. Valeo*, 424 U.S. 1, 108 (1976) ("'Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'") (quoting *Champlin Refining Co. v. Corporation Comm'n*, 286 U.S. 210, 234 (1932)).

The district court's conclusion is supported by this Court's decision in *Casey*, which recognized that states have a substantial interest in unborn life and therefore may proscribe post-viability abortions, with exceptions for the life or health of the mother. 112 S. Ct. at 2816, 2821. It is also consistent with the "rule that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it." *Brockett*, 472 U.S. at 502.

Despite the strong evidence of legislative intent to the contrary, the appellate court concluded the Utah Legislature wanted to prohibit all abortions and reasoned that anything less than a near-total ban, regardless of fetal development, would frustrate this purpose. The court reached this conclusion by relying on the Utah Legislature's 1990 policy statement in House Joint Resolution 39 emphasizing the State's interest in the life of the unborn throughout pregnancy. *Jane L.*, 61 F. 3d at 1497, Pet. App. at A-9. The court, however, ignored the first part of that same statement, which expressly recognized the possibility of constitutional limits on the State's power to protect the unborn: "[T]he policy and position of the Legislature is to favor childbirth over abortion, and [to regulate abortion] **as permitted by the United States Constitution.**" *Id.* (emphasis added) (quoting H.R.J. Res. 39, 48th Leg., 1990 Utah Laws 1555, reproduced in full in Petitioners' Appendix, pp. E-1 to E-3). The court also ignored the express severability clause in the statute itself, erroneously giving undue weight to a policy statement that was not subsequently codified in the Abortion Act.

Moreover, the circuit court's view of the Utah Legislature's intent is internally inconsistent. Responding to plaintiffs' challenge to Utah's statutory provision on the "serious medical emergencies exception," Utah Code Ann. §

76-7-315,[8] the court of appeals rejected the plaintiffs' argument that this section is not severable from the invalidated sections of Utah's Abortion Act. The court ruled that, notwithstanding section 315's specific reference to the invalidated parts of section 302, section 315 "can stand without violating legislative intent" because other portions of the Act remain valid and "continue to impose requirements that, in the face of a medical emergency, could be quite costly and cumbersome." *Jane L.*, 61 F.3d at 1499, Pet. App. at A-13-14. These same reasons for severance should have also governed the court's ruling on the severability of Utah's restrictions on late-term abortions in subsection 302(3).[9]

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[8] Utah Code Ann. § 76-7-315 provides: "When due to a serious medical emergency, time does not permit compliance with Section 76-7-302, Subsection 76-7-304(2) or Subsection 76-7-305(2), the provisions of those sections do not apply." Subsection 76-7-304(2) requires notification, if possible, to a parent or guardian of the woman upon whom the abortion is to be performed, if she is a minor. Subsection 305(2) required the physician to provide the woman upon whom the abortion is to be performed with certain information relating to her voluntary and informed consent. Utah Code Ann. § 76-7-305(2) (1990). The informed consent provisions of subsection 76-7-305(2) were amended in 1993 consistent with the Pennsylvania statute upheld in *Casey*. Under the 1993 amendments, subsection 76-7-315 continues to provide an exception to the requirement of informed consent.

[9] The district court, in reviewing the attorney fee award in this case on remand from the Tenth Circuit, also noted the inconsistency in the court's ruling on severability. In an unusual dissent from his own order on fees, Judge Greene stated that "[f]or substantially the same reasons the appellate court ruled that the medical emergency provision was severable," the post-20 week provision should have also been severed. *Jane L. v. Bangerter*,

B. Appellants recognize that this Court will generally defer to the lower court's construction of state law, but this rule does not operate without exception. For example, in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985), this Court addressed the question of whether the Ninth Circuit Court of Appeals "erred in invalidating in its entirety a Washington statute aimed at preventing and punishing the publication of obscene materials." *Id.* at 493. The Court answered the question in the affirmative, holding that when the statute itself included a severability clause, the federal court of appeals should have followed the course of partial invalidation. *Id.* at 506-07. This result is a natural extension of this Court's holding in *Pennhurst*. Giving effect to an express severability clause in a state statute and invalidating only those provisions found unconstitutional gives due regard to the supremacy of federal law but accommodates the constitutional immunity of the States. *Pennhurst*, 465 U.S. at 105.

In *Brockett*, the Ninth Circuit Court of Appeals reversed the trial court and invalidated Washington's "moral nuisance law" in its entirety on the ground that the statutory definition of "prurient" that included "lust" was unconstitutionally overbroad since it reached constitutionally-protected material. This Court reversed, finding that the statute would validly regulate obscene materials if it were invalidated only insofar as the word "lust" included normal interest in sex. In finding that the court of appeals should have excised the word "lust" from the statute and upheld the remainder of the law, the Court referred to two general rules

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Order on Remand in re Attorney Fees, Civ. No. 91-D-345G, slip op. at 10 (D. Ut., Jan. 5, 1996) (Greene, J., dissenting), Pet. App. at D-8 -12.

to be followed by federal courts addressing the constitutionality of a statute. First, there is the "elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected." *Id.* at 502. Second, it reminded the federal appellate court that the "normal rule" is "that partial, rather than facial, invalidation is the required course." *Id.* at 504.

In reversing the court of appeal's invalidation of the Washington statute, this Court focused first on legislative intent. The Court noted that the act's severability clause is an indication of legislative intent and applied the test of whether elimination of the invalid part would render the remainder of the act "incapable of accomplishing the legislative purposes." *Brockett*, 472 U. S. at 490 (quoting *State v. Anderson*, 501 P. 2d 184, 185-86 (Wash. 1972)). This is the same test that the Utah Supreme Court would apply. *Utah Technology Fin. Corp.*, 723 P.2d at 414; *see also* note 7, *supra*. This Court then concluded that it would be "frivolous to suggest" that the Washington Legislature would have refrained from passing the moral nuisance statute regulating obscenity and prostitution if it could not have also proscribed materials that appealed to normal sexual appetites. *Brockett*, 472 U.S. at 490-91. Similarly, it is frivolous to suggest that the Utah Legislature would not have passed a statute regulating nontherapeutic, late-term abortions if it could not also regulate abortions prior to fetal viability. It is that frivolous suggestion, however, that underlies the appellate court's decision in this case.

C. In refusing to honor the intent of the Utah Legislature to preserve all valid portions of the Act, the Tenth Circuit invalidated the Utah Abortion Act's constitutional limitations on late-term abortions. The record in this case conclusively demonstrates that Utah's post-viability abortion restrictions do not impermissibly burden a woman's protected liberty interests. This Court in *Casey* fixed the point of viability as the "earliest point at which the state's interest in fetal life is constitutionally adequate to justify a **legislative** ban on non-therapeutic abortions." 112 S. Ct. at 2811 (emphasis added). Legislative line-drawing in the abortion context is permissible under this Court's decisions, so long as it is reasonable. *See Webster v. Reproductive Health Servs.*, 492 U.S. 490, 515 (1989) (plurality opinion) (upholding a Missouri statute that "create[d] what is essentially a presumption of viability at 20 weeks [LMP])."[10]

Utah has legislatively determined viability at the end of twenty weeks after the date of conception, or twenty-three weeks from the last menstrual period (LMP). *See* note 3, *supra*. Thus, the question raised is simply whether legislatively delineating viability at this point poses an undue burden under *Casey*. Asked another way, is prohibiting nontherapeutic abortion after twenty weeks post-conception likely to prevent a significant number of woman from choosing a pre-viability abortion? *See Casey*, 112 S. Ct. at 2829. The answer is clearly no.

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[10] Justice O'Connor, concurring in part II-D of the *Webster* opinion, indicated that a statute creating an actual presumption of viability at 20 weeks LMP would not be unconstitutional. 492 U.S. at 527 (O'Connor, J., concurring).

The abortion statistics for the State of Utah and the plaintiffs' testimony conclusively establish that all abortions that have been or are likely to be performed in the State of Utah after twenty weeks post-conception are permitted under section 76-7-302(3).[11] Because late-term abortions are traumatic for both the woman and the doctor, they are not generally performed for nontherapeutic purposes. Furthermore, Plaintiff Dr. Madhuri Shah testified that she has performed only one abortion at twenty-three weeks LMP, which was for a fatal fetal anomaly. Plaintiff Alissa Porter, Director of the Utah Women's Clinic, testified that, since 1989, the clinic had performed abortions on only three fetuses after nineteen weeks post-conception, all for severe abnormalities. Aplee. Supp. App. at 159-60. All of these would be permitted as therapeutic abortions under subsection 76-7-302(3). Finally, Plaintiffs submitted no evidence that any woman wants or has ever attempted to obtain an abortion in Utah after twenty weeks post-conception, other than one permitted by the statute. *Jane L.*, 809 F. Supp. at 869, Pet. App. at B-10; Aplee. Supp. App. at 101, 104, 159-60.

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[11] Utah has kept some of the most meticulous and accurate abortion statistics in the nation. *Jane L.*, 809 F. Supp at 869, Pet. App. at B- 9; Aplee. Sup. App. at 47-48. The Utah Bureau of Vital Records and Health Statistics reports that, from April 1974 through 1990, the year before the amendments to the Utah Abortion Act, only 19 abortions were performed in Utah--therapeutic or nontherapeutic --after the 18th week post-conception. According to plaintiffs' exhibits, approximately 96% of all abortions in the United States are performed prior to the 16th week post-conception. Of the remaining number, approximately 80% are performed between the 16th and the 20th week LMP, which is the same as the period between the 14th and 18th week post-conception. *Jane L.*, 809 F. Supp. at 869, Pet. App. at B- 9; Aplee. Supp. App. at 84.

Under *Casey*, the "proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." 112 S. Ct. at 2829. Here, the group restricted by subsection 76-7-302(3) consists of pregnant women, twenty-one or more weeks post-conception, who are carrying pre-viable fetuses and who want nontherapeutic abortions. On the record before the trial court, however, there is no such group of women and, indeed, no individual class member in that group. Not a single witness in this case has testified that she wanted to obtain an abortion after twenty weeks gestation, other than one that is permitted by Utah law. Thus, there is no basis for concluding that Utah's restrictions on late-term abortions are constitutionally impermissible.

Utah's restrictions on post-viability abortions are valid and severable from the unconstitutional pre-viability restrictions; they should be allowed to stand. Petitioners therefore ask this Court to issue a writ of certiorari and correct the appellate court's complete failure to honor the Utah Legislature's express intent to sever any unconstitutional provision of the Utah Abortion Act from the remaining, valid portions of the Act.

II

Two provisions of the Utah Abortion Act require the physician performing a post-viability abortion to use the medical procedure and skills that, in the "best medical judgment of the physician," give the viable fetus the "best chance of survival," consistent with the physician's responsibility to prevent death of the pregnant woman or to prevent grave damage to her health. Utah Code Ann. §§ 76-

7-307,-308. These choice-of-method provisions apply only when there is a reasonable possibility that the unborn child can survive outside the womb. At that point, the State has a valid interest in seeking to save the life of the unborn child. *Casey,* 112 S. Ct. at 2817; *Webster,* 492 U.S. at 528 (O'Connor, J., concurring); *Roe,* 410 U.S. at 163-64. By their terms, however, these provisions do not apply if they conflict with the physician's efforts to preserve the mother's life or prevent grave damage to her medical health.

The district court found Utah's choice-of-method provisions are facially valid on the grounds that the State has a compelling interest in viable fetal life and that the Act's requirements did not constitute an undue burden on the woman's right to choose to abort a viable fetus. The district court specifically held that "Utah's post-viability abortion provisions square with the emphasis in *Casey* on the State's interest in viable fetal life." *Jane L.*, 809 F. Supp. at 875, Pet. App. at B- 26. The trial court also concluded that the statute has a precautionary "safety valve" because the physician is required, in any abortion, to "consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed." *Id.* (quoting Utah Code Ann. § 76-7-304(1)).

The Tenth Circuit reversed. In finding the choice-of-method provisions unconstitutional, the court mistakenly relied on the now-discredited analysis in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986). *Jane L.*, 61 F.3d at 1504, Pet. App. at A-25, 28. As the trial court recognized, *Thornburgh* is not controlling because it cannot be reconciled with *Casey* and, in any case, the statutory provisions challenged in *Thornburgh* are distinguishable from the Utah statute at issue here.

The trimester approach of *Roe* was rejected by the Joint Opinion in *Casey*. 112 S. Ct. at 2818. According to the *Casey* Joint Opinion, *Thornburgh* and other cases applying the rules derived using the trimester framework cannot be reconciled with the State's interests in protecting the potential life of an unborn child. 112 S. Ct. at 2817. Because *Thornburgh* did not consider the State's interests in fetal life and applied the "strict scrutiny" analysis, which *Casey* abandons in the abortion context, it does not dictate the result here.

Applying *Casey's* "undue burden" analysis, the Utah statute is constitutional. Utah's choice-of-method provisions simply require the physician to attempt to save the viable fetus "consistent with the purpose of saving the life of the woman or preventing grave damage to her health." They do not impose an undue burden on the woman. *Jane L.*, 809 F. Supp. at 875, Pet. App. at B-26. Maternal health, not fetal survival, remains the physician's paramount consideration.[12]

Moreover, to the extent that *Thornburgh* survives *Webster* and *Casey*, the statute at issue here is distinguishable. In *Thornburgh*, the challenged Pennsylvania provision required the physician to use the abortion technique "which would provide the best opportunity for the unborn child to be aborted alive unless," in the physician's good faith judgment,

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[12] The Tenth Circuit's reliance on *Thornburgh* for the proposition that the State may not mandate **anything** that might increase the medical risk to the woman contravenes *Casey*. In *Casey*, this Court upheld the challenged twenty-four hour waiting period, concluding it did not create an undue burden even though it would increase the medical risks for some women. *Casey*, 112 S. Ct. at 2825.

that technique "would present a **significantly greater** medical risk to the life or health of the pregnant woman." *Thornburgh*, 476 U.S. at 768 (emphasis added) (quoting section 3210(b) of the Pennsylvania statute).[13] This Court agreed this language is "not susceptible to a construction that does not require the mother to bear an increased medical risk in order to save her viable fetus." *Id.* at 769. In other words, the statute required the woman to bear an additional risk to save the potentially viable fetus.

In contrast, the Utah statute does not require the mother to bear any increased medical risk in order to save her viable fetus. The choice-of-method provisions only apply when the mother is already at risk--she is having the post-viability abortion to save her life or to prevent grave damage to her health. The abortion itself, however, also poses certain risks to both the mother and the viable fetus. The question the physician must ask is whether an abortion procedure that might save the unborn child would endanger the mother's health or life. If the answer is yes, that procedure is not mandated by the statute; rather, it is precluded by the statute. There is no additional risk to the mother and, therefore, no impermissible "trade-off" of the mother's health.

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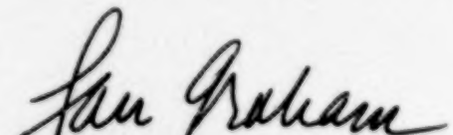
[13] The Pennsylvania statute also did not allow the physician to consider as a "medical risk" the potential psychological impact on the mother of the unborn child's survival. *Thornburgh*, 476 U.S. at 768 n.13. In contrast, under the Utah statute, the physician, in exercising his or her medical judgment, must consider all factors relevant to the well-being of the woman, including her physical, emotional and psychological health and safety. Utah Code Ann. § 76-7-304(1).

It is irrational to interpret the choice-of-method provisions to require a physician to jeopardize maternal life or health when it was the threat to her life or health that justified the abortion in the first instance. In keeping with the need to protect the life and medical health of the woman, the physician is only being required to also seek to save the life of the viable child. In so doing, sections 76-7-307 and -308 give a physician wide latitude to use his or her "best medical judgment," as required by section 76-7-304, in determining whether continued pregnancy threatens grave damage to the medical health of the woman, and in selecting what method of abortion will best remove that threat while giving the unborn child the best chance of survival. Neither section forbids performance of the abortion. The statute simply makes it clear that a physician has a contemporaneous duty to the unborn child subordinate to his or her obligation to save the woman's life or prevent damage to her health. The statute vindicates the State's substantial interests in viable life without putting any obstacle in the path of a woman seeking an abortion.

Because the Tenth Circuit has incorrectly relied on *Thornburgh* to strike down the choice-of-method provisions in the Utah Abortion Act and because the court failed to understand how *Casey* applies to the statute challenged here, Petitioners ask this Court to issue a writ of certiorari to review this second question presented.

CONCLUSION

For the foregoing reasons, the Utah Governor's and Attorney General's petition for writ of certiorari should be GRANTED.



JAN GRAHAM
Utah Attorney General
Counsel of Record

February 1996

PETITIONERS' APPENDIX

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JANE L., on behalf of herself and all others similarly situated; UTAH WOMEN'S CLINIC, P.C.; PLANNED PARENTHOOD ASSOCIATION OF UTAH; DAVID HANSEN, M.D.; MADHURI SHAH, M.D.; JOHN CAREY, M.D.; DAN CHICHESTER, M.D.; KIRTLY PARKER JONES, M.D.; KATHLEEN KENNEDY, M.D.; NEIL K. KOCHENOUR, M.D.; RHONDA LEHR, M.D.; CLAIRE LEONARD, M.D.; KENNETH WARD, M.D.; BONNIE JEANNE BATY, M.D.; SUSAN ELIZABETH LYONS, L.C.S.W.; JANET LYNN WOLF, L.C.S.W.; LESLIE MCDONALD-WHITE, L.C.S.W.; REVEREND DAVID BUTLER; REVEREND BARBARA HAMILTON-HOLWAY; REVEREND GEORGE H. LOWER; REVEREND LYLE D. SELLARDS; REVEREND DOCTOR ALAN CONDIE TULL; REVEREND MARIE SOWARD GREEN; RABBI FREDERICK L. WENGER; JANE J. FREEDOM, (PSEUDO-NAME); JULIE SPOUSE, (PSEUDO-NAME); AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, UTAH SECTIONS; PENNY THOMPSON; WENDY EDWARDS,

Plaintiffs-Appellants,

v.

Norman H. BANGERTER, as Governor of the State of Utah;

PAUL VAN DAM, ATTORNEY GENERAL, as Attorney General of Utah,

Defendants-Appellees.

Nos. 93-4044, 93-4059

Appeal from the United States District Court
for the District of Utah
(D.C. No. 91-CV-345-G)

Simon Heller (Janet Benshoof and Rachael Pine, of The Center for Reproductive Law & Policy, New York, New York; and Jeffrey R. Oritt, of Cohne, Rappaport & Segal, P.C., Salt Lake City, Utah; and A. Howard Lundgren, of Bugden & Lundgren, Salt Lake City, Utah, with him on the briefs), of The Center for Reproductive Law & Policy, New York, New York, for Plaintiffs-Appellants.

Jerrold S. Jensen, Assistant Attorney General (Jan Graham, Utah Attorney General and Brent A. Burnett, Assistant Attorney General, with him on the brief), Salt Lake City, Utah, for Defendants-Appellees.

Before SEYMOUR, Chief Judge, MOORE, Circuit Judge, and BROWN, Senior District Judge.*

SEYMOUR, Chief Judge.

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* Honorable Wesley E. Brown, Senior United States District Judge, District of Kansas, sitting by designation.

In the instant case, we are called upon to determine the legal vitality of several provisions of Utah's 1991 abortion law against the backdrop of Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S.Ct. 2791 (1992). On January 25, 1991, Utah's governor signed "An Act Relating to Abortion; Prohibiting Abortion Except Under Specified Circumstances." This legislation, which prohibited all abortions except in five enumerated situations, patently violated Roe v. Wade, 410 U.S. 113 (1973). Recognizing that their legislation was a facial attack on prevailing Supreme Court abortion jurisprudence, the Utah legislature simultaneously set aside funds in an "Abortion Litigation Trust Account." Utah Code Ann. § 76-7-317.1. Meanwhile, the Supreme Court reconfronted abortion jurisprudence in Casey, which involved a similarly restrictive Pennsylvania abortion law. Although Casey realigned the law, it reaffirmed the central tenet of Roe v. Wade that state regulation of abortion impinges on a woman's right to privacy. Utah's attempt to play a significant role in toppling Roe v. Wade did not succeed, and we now assess the constitutionality of the remnants of Utah's pre-Casey legislation. [1]

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[1] We note in passing that we asked the parties to brief a jurisdictional issue at a preliminary stage of the appellate proceedings. We are satisfied that any jurisdictional problems have been corrected and that appellate jurisdiction is present. The parties do not argue to the contrary.

I.

In April 1991, plaintiffs filed a complaint challenging the newly amended Utah Abortion Act, Utah Code Ann. §§ 76-7-301 et seq. In an eight-count amended complaint filed shortly thereafter, plaintiffs alleged several federal and state constitutional violations. Following a period of discovery, defendants filed a Motion to Dismiss and a Motion for Partial Summary Judgment, and the district court orally entered orders vacating trial and granting the motions as to certain causes of action. In Jane L. v. Bangerter, 794 F.Supp. 1528 (D. Utah 1992) (Jane L. I), the district court denied plaintiffs' motion to voluntarily dismiss claims arising under Utah's constitution without prejudice and instead dismissed the state constitutional claims with prejudice. In Jane L. v. Bangerter, 794 F. Supp. 1537 (D.Utah 1992) (Jane L. II), the district court granted defendants' motions with regard to the following claims: vagueness, equal protection, Establishment Clause, Free Exercise Clause, involuntary servitude, freedom of speech, and fetal experimentation (vagueness and privacy). The court kept the remaining claims under advisement pending the Supreme Court's decision in Casey, 112 S. Ct. 2791.

Casey was argued April 22, 1992, one month before the district court issued Jane L. I and Jane L. II. The Supreme Court decided Casey on June 29, 1992. The district court decided the remaining issues in this case on December 17, 1992. Jane L. v. Bangerter, 809 F.Supp. 865 (D.Utah 1992) (Jane L. III). The court held that in light of Casey the pre-20 week restrictions on abortions in Utah Code Ann. § 76-7-302(2), as well as the spousal notification provision in Utah Code Ann. § 76-7-304(2), were unconstitutional. The court upheld the choice of method provisions in Utah Code

Ann. §§ 76-7-307 and 308 and the serious medical emergency exception in Utah Code Ann. § 76-7-315. The district court also upheld the stringent limitations on the availability of post-20 week abortions. Utah Code Ann. § 76-7-302(3). For the reasons set forth below, we affirm in part and reverse in part.

II.

SEVERABILITY

A. Section 302(3): Post-20 Week Abortion Ban

The district court's first task after Casey was to determine the constitutionality of section 302 of the Act.[2]

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[2]Utah Code Ann. § 76-7-302. Circumstances under which abortion authorized.

(1) An abortion may be performed in this state only by a physician licensed to practice medicine under the Utah Medical Practice Act or an osteopathic physician licensed to practice medicine under the Utah Osteopathic Medicine Licensing Act and, if performed 90 days or more after the commencement of the pregnancy as defined by competent medical practices, it shall be performed in a hospital.

(2) An abortion may be performed in this state only under the following circumstances:

(a) in the professional judgment of the pregnant woman's attending physician, the abortion is necessary to save the pregnant woman's life;

(b) the pregnancy is the result of rape or rape of a

The court held that section 302(2) was unconstitutional in light of the Supreme Court's decision in Casey. Section 302(2) banned all abortions in Utah except under five narrow circumstances: (a) to save the pregnant woman's life; (b) to terminate a pregnancy resulting from rape; (c) to terminate a pregnancy resulting from incest; (d) to prevent grave damage to the pregnant woman's medical health; and (e) to prevent the birth of a child that would be born with grave defects. Section 302(3) provided that abortions after 20 weeks gestational age could only be performed to save the mother's life, to prevent grave damage to the woman's health, and to prevent the birth of a child with grave defects. In other words, section 302(3) narrowed section 302(2) further after 20 weeks gestational age to eliminate the exception for rape or incest.

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child, as defined by Sections 76-5-402 and 76-5-402.1, that was reported to a law enforcement agency prior to the abortion;

(c) the pregnancy is the result of incest, as defined by Subsection 76-5-406(10) or Section 76-7-102, and the incident was reported to a law enforcement agency prior to the abortion;

(d) in the professional judgment of the pregnant woman's attending physician, to prevent grave damage to the pregnant woman's medical health; or

(e) in the professional judgment of the pregnant woman's attending physician, to prevent the birth of a child that would be born with grave defects.

(3) After 20 weeks gestational age, measured from the date of conception, an abortion may be performed only for those purposes and circumstances described in Subsections 2(a), (d), and (e).

(4) The name of a victim reported pursuant to Subsection (b) or (c) is confidential and may not be revealed by law enforcement or any other party except upon approval of the victim. This subsection does not effect or supersede parental notification requirements otherwise provided by law.

The district court held that section 302(3) was severable from section 302(2). The court further held that section 302(3) did not impose an undue burden on a woman's liberty interest and therefore was constitutional under Casey. Plaintiffs appeal both of these holdings. After a de novo review, United States v. Johnson, 941 F.2d 1102, 1111 (10th Cir.1991), we conclude that section 302(3) is not severable and therefore is invalid along with section 302(2).[3]

Severability is an issue of state law. See Watson v. Buck, 313 U.S. 387, 396, (1941). Under Utah law, legislative intent governs the severability inquiry. See Stewart v. Utah Pub. Serv. Comm'n, 885 P.2d 759, 779 (Utah 1994); Utah Technology Fin. Corp. v. Wilkinson, 723 P.2d 406, 414 (Utah 1986); Berry v. Beech Aircraft Corp., 717 P.2d 670, 686 (Utah 1985); Salt Lake City v. International Ass'n of Firefighters, 563 P.2d 786, 791 (Utah 1977).

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[3] Given our holding that section 302(3) is not severable and is therefore invalid, we need not address plaintiffs' argument that Utah's post-20 week criminal ban on abortions in section 302(3) is an imperfect proxy for viability and therefore violates the Supreme Court's holding in Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992).

Legislative intent is determined first and foremost by answering the following question: Would the legislature have passed the statute without the unconstitutional section? See Stewart, 885 P.2d at 779 (" 'The test fundamentally is whether the legislature would have passed the statute without the objectionable part....' ") (quoting Union Trust Co. v. Simmons, 211 P.2d 190, 193 (1949)); Berry, 717 P.2d at 686 (holding an act nonseverable because "[w]e cannot conclude that the legislature would have enacted [the remaining sections] without [the unconstitutional section].").

To determine whether the legislature would have passed a statute without its unconstitutional section, courts should examine the interdependence of the statutory provisions. See Stewart, 885 P.2d at 779 (where statutory provisions are "so dependent upon each other . . . the court should conclude the intention was that the statute be effective only in its entirety" (quoting Union Trust, 211 P.2d at 193)); International Ass'n of Firefighters, 563 P.2d at 791 ("[W]here the provisions are interrelated, it is not within the scope of the court's function to select the valid portions and make conjecture the legislature intended they should stand independent of the portions which are invalid.").

The substantive intent of the Utah legislature in passing section 302 was clearly to challenge the Roe v. Wade framework and to ban abortion throughout pregnancy, although with a few exceptions. See Utah Women's Clinic, Inc. v. Leavitt, 844 F. Supp. 1482, 1484-85 (D. Utah 1994). The legislature explicitly set forth this intent in the preamble: "It is the intent of the Legislature to protect and guarantee to unborn children their inherent and inalienable right to life . . ." Utah Code Ann. § 76-7-301.1(3). The resolution which served as the precursor to Utah's 1991 abortion act buttresses

our reading of legislative intent.

> The policy and position of the Legislature is to favor childbirth over abortion, and [to regulate abortion] as permitted by the U.S. Constitution. . . .
>
> [L]ives of human beings are to be recognized and protected regardless of their degree of biological development. . . .
>
> Utah has a compelling state interest in the life of the unborn throughout pregnancy. . . .
>
> [A]bortion is not a legitimate or appropriate method of birth control. . . .
>
> [I]t is the policy of the Legislature that, if an abortion is granted, it should be only under very limited circumstances, including danger to the life or physical health of the mother, pregnancies resulting from rape or incest, and cases of severe deformity of the unborn child.

H.J.R. Res. 38, 48th Leg., 1990 Utah Laws 1554-55. The legislature clearly intended to prohibit all abortions, regardless of when they occur during the pregnancy, except in the few specified circumstances.

Sections 302(2) and 302(3) were the operative statutory sections designed to execute this intent. Together they operated as a unified expression of legislative intent to ban most abortions, from conception to birth. Section 302(2), the overarching abortion ban, prohibited abortions in all but

the five described circumstances, and section 302(3) merely modified this ban, removing the rape and incest exceptions for abortions after 20 gestational weeks. With the nullification of the abortion ban in section 302(2), the statute was gutted, and section 302(3) was left purposeless without an abortion ban to modify. It is not our role to rewrite the general abortion ban by elevating section 302(3), which simply modified a now-defunct statute, to the general rule. We therefore hold that section 302(3) is not severable.

Defendants argue that the legislature intended for all provisions to be severable and that this intent should govern our disposition of the severability issue. They point to the severability clause in the 1991 abortion act, which reads as follows.

> If any one or more provision, section, subsection, sentence, clause, phrase or word of this part or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of this part shall remain effective notwithstanding such unconstitutionality. The legislature hereby declares that it would have passed this part, and each provision, section, subsection, sentence, clause, phrase or word thereof, irrespective of the fact that any one or more provision, section, subsection, sentence, clause, phrase, or word be declared unconstitutional.

Utah Code Ann. § 76-7-317. Under Utah law, courts must ask whether the legislature would have passed the statute

without the unconstitutional section when determining whether the legislature intended for certain provisions to be severable from others. Defendants argue that the second sentence of section 317, stating that the legislature would have passed each section independent of the unconstitutional part, demands that we sever section 302(3). We disagree.

We confront here potentially conflicting legislative intents. Substantively, severing 302(3) from 302(2) clearly undermines the legislative purpose to ban most abortions. Structurally, severance seems to have been contemplated and approved by the legislature. Which takes precedence? We conclude that the substantive legislative intent predominates and precludes severability for two reasons.

First, Utah case law resolves conflicts among legislative intentions in favor of the legislature's overarching substantive intent. Under Utah law, courts can and should ignore severability (or savings) clauses if severance would undermine legislative intent. For example, in Doe v. Rampton, 366 F. Supp. 189 (D. Utah 1973), the district court entertained a post-Roe challenge to Utah's abortion statute. Even though the court did not hold all provisions of the statute unconstitutional, it ignored a severability clause and invalidated the entire statute.[4] Id. at 193-94. The district court stated: "Each and every challenged part of these statutes was intended to and does contribute" to the improper purpose of "making the obtaining or performing of an abortion in Utah extremely burdensome." Id. The court refused to "edit these statutes in order to alter the legislative

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[4] Because severability is an issue of state law, the district court in Doe v. Rampton necessarily applied Utah law to determine severability. 366 F. Supp. 189 (D. Utah 1973).

purpose." Id. at 194.

The Utah Supreme Court similarly ignored a severability clause in Salt Lake City v. International Ass'n of Firefighters, 563 P.2d 786. In that case, the provisions of the Utah Firefighters' Negotiation Act (UFNA) governing arbitration were held violative of the Utah constitutional provision proscribing state legislative usurpation of municipal functions. The Utah Supreme Court held that the UFNA, a comprehensive statute designed to aid in the resolution of labor disputes, was "sequential in nature, commencing with negotiations concerning specific subject matter and culminating in arbitration of all unresolved issues." Id. at 791. Because the arbitration provisions were integral to fulfilling legislative intent and because the various provisions were sequentially interrelated, the Utah Supreme Court held that the unconstitutional arbitration provision was not severable, even in the face of a severability clause. Id.; see also State v. Salt Lake City, 445 P.2d 691, 696 (Utah 1968) ("[E]ven where a savings clause existed, where the provisions of the statute are interrelated, it is not within the scope of this court's function to select the valid portion of the act and conjecture that they should stand independently of the portions which are invalid."); Carter, 399 P.2d at 441-42 (ignoring severability clause where remaining statutory sections are dependent upon the one declared unconstitutional). Utah law instructs that we subordinate severability clauses, which evince the legislature's intent regarding the structure of the statute, to the legislature's overarching substantive intentions. In the hierarchy of often conflicting legislative intentions, Utah law mandates that substantive intent take precedence.

Second, it is unclear whether our conclusion regarding

the severability of section 302(3) actually conflicts with the Utah legislature's structural intentions.
Section 317.2 reads as follows:

> If Section 76-7-302 as amended by Senate Bill 23, 1991 Annual General Session, is ever held to be unconstitutional by the united States Supreme Court, Section 76-7-302, as enacted by Chapter 33, Laws of Utah 1974, is reenacted and immediately effective.

Utah Code Ann. § 76-7-317.2. The inclusion of section 317.2 suggests that the legislature contemplated Supreme Court invalidation of the general abortion ban in section 302 and wanted to provide a clear road map to cover this contingency. We interpret section 317.2 as making an exception to the general severability clause specifically for section 302.

In sum, sections 302(2) and 302(3), together, effected the Utah legislature's purpose of banning abortions throughout pregnancy. Although the legislature included a severability clause, the Utah Supreme Court has repeatedly ignored such clauses in the name of legislative intent. We conclude that severing section 302(3) from section 302(2) would undermine legislative intent. Section 317.2, which provides a specific contingency for the scenario at hand, bolsters this conclusion. The district court held that section 302(2) is unconstitutional, and defendants do not appeal that holding. Section 302(3), as an integral, unseverable post-20 week analog to section 302(2), must also be invalidated. We hold that section 302(3) is not severable from 302(2) and reverse the district court's contrary holding.

B. Section 315: Serious Medical Emergency Exception

Plaintiffs also argue that Utah Code Ann. § 76-7-315 is not severable from the sections of the abortion statute that the district court invalidated. Section 315 provides:

> When due to a serious medical emergency, time does not permit compliance with Section 76-7-302, Subsection 76-7-304(2) or Subsection 76-7-305(2), the provisions of those sections do not apply.

We have held that section 302(3) is invalid. The district court held that the pre-20 week abortion ban in section 302(2) and the spousal notification portion of section 304(2) were unconstitutional, and defendants do not appeal these holdings. We nonetheless conclude that the remainder of section 315 can stand without violating legislative intent. Section 315 provides medical professionals with greater flexibility and discretion when confronting a serious medical emergency. While the invalidation of sections 302(2), 302(3), and part of section 304(2) necessarily reduces the reach of section 315, the remainder of section 304(2) (parental notification) and section 305(2) (informed consent requirements) remain valid and continue to impose requirements that, in the face of a medical emergency, could be quite costly and cumbersome. It would therefore frustrate legislative intent if we concluded that section 315 was invalid in its entirety simply because we invalidated some of the provisions cited therein. We hold that section 315 is severable from the invalidated portions of the statute.

III.

FETAL EXPERIMENTATION BAN

Section 310 provides: "Live unborn children may not be used for experimentation, but when advisable, in the best medical judgment of the physician, may be tested for genetic defects." Utah Code Ann. § 76-7-310. Any violation of this section, regardless of mental state, is a felony of the third degree. See Utah Code Ann. § 76-7-314(2). Plaintiffs argued below that this statute was unconstitutionally vague and impinged upon their constitutionally protected right to privacy. In rejecting these arguments, the district court concluded that the plain meaning of the statutory phrase "used for experimentation" is "to protect unborn children from tests or medical techniques which are designed solely to increase a researcher's knowledge and are not intended to provide any therapeutic benefit to the mother or child." Jane L. II, 794 F. Supp. at 1550. The court further concluded that "[a]s long as there is intent to benefit the fetus or the mother, the fetus is not being 'used for experimentation.' " Id. Thus determining that the statute does not proscribe beneficial tests or therapies, the court summarily rejected the right to privacy claim. Id. at 1551.

Plaintiffs assert that the fetal experimentation statute should be deemed void for vagueness, contending that the district court's interpretation of the statute contradicts its plain meaning and legislative history and violates established rules of statutory interpretation. Plaintiffs also reassert their argument that the statute violates their constitutionally protected right to privacy. After a de novo review, Horowitz v. Schneider Nat'l, Inc., 992 F.2d 279, 281 (10th Cir.1993), we hold that the statute is unconstitutionally vague.

Vague laws frustrate several principles that have been sturdy pillars of our legal system.

> "First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judge, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications."

Village of Hoffman Estates v. Flipside, 455 U.S. 489, 498 (1982) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)). We therefore invalidate vague criminal statutes when they "fail to alert the average person of the prohibited conduct." Brecheisen v. Mondragon, 833 F.2d 238, 241 (10th Cir.1987), cert. denied, 485 U.S. 1011, (1988).

We "indulge a presumption" of constitutionality when reviewing vagueness challenges to state statutes. Id. In a civil context, where the enactment does not implicate constitutional rights, a court should find a statute unconstitutionally vague only if "the enactment is impermissibly vague in all of its applications." Hoffman Estates, 455 U.S. at 494-95. Where a statute imposes a criminal penalty, we can invalidate it "even when it could

conceivably have had some valid application." Kolender v. Lawson, 461 U.S. 352, 358 n. 8 (1983) (quoting Hoffman Estates, 455 U.S. at 494). In the instant case, anyone who violates section 310 is subject to third degree felony charges and penalties. See Utah Code Ann. § 76-7-314(2). Consequently, the less demanding Kolender standard governs this case.

Section 310 bans "experimentation" on "live unborn children." "Experimentation" is an ambiguous term that lacks a precise definition. What tests and procedures constitute experimentation? There are at least three possible answers: 1) those procedures that a particular doctor or hospital have not routinely conducted; 2) those procedures performed on one subject that are designed to benefit another subject; and 3) those procedures that facilitate pure research and do not necessarily benefit the subject of experimentation. See Lifchez v. Hartigan, 735 F. Supp. 1361, 1364-65, 1376 (N.D. Ill. 1990) (concluding the term "experimentation" was unconstitutionally vague and therefore invalidating similar fetal experimentation ban); see also Margaret S. v. Edwards, 794 F.2d 994, 998-99 (5th Cir.1986) (invalidating Louisiana fetal experimentation statute because "experimentation" was unconstitutionally vague). Testimony in the record highlights the ambiguities in the term "experimentation." For example, one doctor testified that "experimentation" can have two distinct meanings: 1) "[W]hen you do things to see--just wonder 'What would happen if I did this? What would happen if I gave a fetus this drug; what would be the outcome [?]' "; and 2) doing a procedure without a "data base of many cases to rely upon." Aplt. App. at 172. Because there are several competing and equally viable definitions, the term "experimentation" does not place health care providers on adequate notice of the legality of their conduct.

The Supreme Court recognizes "that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." Hoffman Estates, 455 U.S. at 499; see also Colautti v. Franklin, 439 U.S. 379, 395 (1979). While this statute has a clear scienter requirement for those who "perform an abortion," Utah Code Ann. § 76-7-314(1), it has no similar requirement for those who conduct fetal experimentation. In fact, the statute explicitly states that any violation of section 310 is a felony of the third degree. Id. at § 76-7-314(2) (emphasis added). We thus cannot salvage the ambiguities inherent in the term "experimentation" through resort to an additional scienter requirement.

Defendants argue that the district court cured the statute's ambiguity and vagueness by interpreting "used for experimentation" as prohibiting only those experiments that do not benefit either mother or fetus. We reject this argument for three reasons. First, the district court rewrote the statute. Second, the district court's interpretation contradicts the legislative history, thereby violating steadfast rules of statutory interpretation. Finally, even as interpreted by the district court, "used for experimentation" is unconstitutionally vague.

In an effort to cure the fatal ambiguity in the statute, the district court grafted its own meaning onto the statute's language. We do not understand how "used for experimentation" translates to "tests or medical techniques which are designed solely to increase a researcher's knowledge and are not intended to provide any therapeutic benefit to the mother or child." Jane L. II, 794 F. Supp. at 1550. The district court blatantly rewrote the statute,

choosing among a host of competing definitions for "experimentation." This is an improper use of judicial power.

In rewriting the statute, the court also contradicted legislative intent. The Utah legislature enacted the fetal experimentation ban in its present form in 1974. The same legislature enacted two choice of method provisions, which were amended in 1991 and are now codified at Utah Code Ann. §§ 76-7-307 and 308.[5] In 1974, these provisions required doctors performing post-viability abortions to choose the abortion method that would give the unborn child the best chance of survival unless doing so would cause "serious and permanent damage" to the woman's health. Utah Code Ann. §§ 76-7-307 and 76-7-308 (amendment notes). It would be anomalous to require that a woman suffer serious health damage to benefit a fetus when pursuing an abortion but to permit a woman to undergo any beneficial, but experimental, treatment regardless of its effect on the fetus. In other words, the choice of method provisions enacted concurrently reveal the legislature's intent to protect the life of the fetus. Grafting an interpretation onto the fetal experimentation section that weighs benefits to the pregnant woman on a par with benefits to the fetus is patently inconsistent with legislative intent. By construing the fetal experimentation ban to include an exception for experimentation designed to benefit the pregnant woman, the district court improperly substituted its own judgment for that of the legislature.

The district court's interpretation also violated rules of statutory interpretation. "As a general principle of statutory interpretation, if a statute specifies exceptions to its general

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[5] See text of statutes infra at 22-23 n. 6.

application, other exceptions not explicitly mentioned are excluded." United States v. Goldbaum, 879 F.2d 811, 813 (10th Cir.1989); see also Andrus v. Glover Constr. Co., 446 U.S. 608, 616-17 (1980). Section 310 arguably contains an exception to the comprehensive ban to allow testing for genetic defects.[6] The district court's interpretation excludes from the general ban all procedures beneficial to the pregnant woman or fetus, thereby creating additional, unspecified exceptions and violating this canon of statutory construction. Moreover, a court's interpretation of a statute should not render any clauses superfluous. See Bridger Coal Co. v. Office of Workers' Compensation Programs, 927 F.2d 1150, 1153 (10th Cir.1991). As interpreted by the district court, the fetal experimentation ban would allow all diagnostic testing because the pregnant woman benefits from knowing more information about the welfare of her child. Genetic testing is a particular type of diagnostic testing. The genetic testing exception therefore becomes superfluous.

Finally, the district court interpreted "used for experimentation" to prohibit only those procedures that provide no benefit to mother or fetus. Although curing some of the imprecision in the term "experimentation," this construction is not free from ambiguity. What does "benefit" mean? If the mother gains knowledge from a procedure that would facilitate future pregnancies but inevitably terminate the current pregnancy, would the procedure be deemed

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[6] Section 310 is a poorly drafted statute, and we recognize that the second clause is only arguably an exception. However plaintiffs, Aplt. Br. at 40-41, and defendants, Aplee. Br. at 45 n. 18, agree that this clause is an "exception." We therefore assume that the genetic testing clause constitutes an exception.

beneficial to the mother? Does the procedure have to be beneficial to the particular mother and fetus that are its subject? In vitro fertilization exposes and fertilizes several ova to assure that one can be implanted in the mother. The other ova are destroyed. Would this common procedure be proscribed under the statute because some ova are subjected to non-therapeutic experimentation, i.e., of no benefit to the ovum or the mother? Accordingly, we conclude that the district court's interpretation is itself unconstitutionally vague.

The criminal law must clearly demarcate criminal conduct from permitted action. Section 310 does not do that here. During the course of the proceedings, one doctor testified that he had developed a procedure to cure a fatal abnormality in a fetus. Not only was he unsure whether this treatment constituted experimentation for the purposes of the statute, but he was also reluctant to testify for fear that his actions "could theoretically be considered illegal under the Utah statute that was in effect" when he began the treatment. Aplt. App. at 182. Because of the vagaries of the statute, individuals like this doctor may avoid conduct that would not be proscribed in order to avert criminal liability to the detriment of beneficial research. By failing to draw a clear line between proscribed and permitted conduct, section 310 violates established legal principles that provide a crucial backdrop to our criminal legal system. We hold section 310 unconstitutionally vague and reverse the district court's decision with regard to this claim.

IV

CHOICE OF METHOD PROVISIONS

Sections 307 and 308 require that a doctor perform a post-viability abortion in a manner that "will give the unborn child the best chance of survival" unless that method would cause "grave damage to the woman's medical health." Utah Code Ann. §§ 76-7-307 and 308.[7] Both plaintiffs and defendants characterize these two statutes as "choice of method" provisions given that they require a doctor to use the abortion method that would best assure the unborn child's chances of survival unless such a method would gravely damage a woman's medical health. The district court held that these two provisions were "facially valid" and bore "a

[7] Utah Code Ann. § 76-7-307 provides:

> If an abortion is performed when the unborn child is sufficiently developed to have any reasonable possibility of survival outside its mother's womb, the medical procedure used must be that which, in the best medical judgment of the physician will give the unborn child the best chance of survival.
>
> No medical procedure designed to kill or injure that unborn child may be used unless necessary, in the opinion of the woman's physician, to prevent grave damage to her medical health.

Utah Code Ann. § 76-7-308 provides:

> Consistent with the purpose of saving the life of the woman or preventing grave damage to the woman's medical health, the physician performing the abortion must use all of his medical skills to attempt to promote, preserve and maintain the life of any unborn child sufficiently developed to have any reasonable possibility of survival outside of the mother's womb.

rational relationship to the legitimate state interest in preservation of viable fetal life." Jane L. III, 809 F.Supp. at 875-76. Relying on Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986), plaintiffs argue on appeal that these provisions violate a woman's right to privacy. We agree and reverse.

In Thornburgh, the Supreme Court invalidated a Pennsylvania choice of method statute.[8] The Court agreed with the Third Circuit that the statute was unconstitutional "because it required a 'trade-off' between the woman's health

[8] The Pennsylvania statute invalidated in Thornburgh read as follows:

> "Every person who performs or induces an abortion after an unborn child has been determined to be viable shall exercise that degree of professional skill, care and diligence which such person would be required to exercise in order to preserve the life and health of any unborn child intended to be born and not aborted and the abortion technique employed shall be that which would provide the best opportunity for the unborn child to be aborted alive unless, in the good faith judgment of the physician, that method or technique would present a significantly greater medical risk to the life or health of the pregnant woman than would another available method or technique and the physician reports the basis for his judgment."

Thornburgh v. American College of Obstetricians, 476 U.S. 747, 768 n. 13 (1986) (quoting 18 Pa. Cons. Stat. § 3210(b) (1982)).

and fetal survival, and failed to require that maternal health be the physician's paramount consideration." Thornburgh, 476 U.S. at 768-69, 106 S.Ct. At 2183 (citing Colautti, 439 U.S. at 400, 99 S.Ct. At 688). The Thornburgh analysis thus guides our disposition of this case.

Sections 307 and 308 require that the doctor focus on the unborn child's chances of survival until the risk to the woman's health becomes grave. In demanding that the woman's health be in grave danger before prevailing under the choice of method requirements, sections 307 and 308 are significantly more burdensome than the statute in Thornburgh. In Thornburgh, the woman's health risks outweighed those of the unborn child if the particular "method or technique would present a significantly greater medical risk to the life or health of the pregnant woman." Id. at 768 n. 13 (quoting 18 Pa. Cons. Stat. § 3210(b) (1982)). Whether "significantly greater" in this context means an "increased medical risk," as the majority then concluded, id. at 769, or "nonnegligible" or "real and identifiable," as two dissenters noted, id. at 807 (White, J., dissenting) and 832 (O'Connor, J. dissenting), it is clear that sections 307 and 308 are notably more onerous. Testimony of several of defendants' witnesses underscores the health burden that these statutes place on a woman's right to choose to have an abortion. Dr. Cruikshank, an expert witness for defendants, defined "grave" as "[l]oss of structure or function, shortening of life, irremedial pain and suffering." Aplt. App. at 95. Dr. Richard Hebertson, another of defendants' witnesses, testified that "grave" is synonymous with "[s]erious, complex, threatening." Id. at 93. As admitted by defendants' witnesses, the woman must suffer serious or threatening "loss of structure or function," "shortening of life," or "irremedial pain and suffering" before her interests take precedence over

the unborn child's interests.

Defendants argue that the relevant portions of Thornburgh were uprooted by Casey and cannot legitimately support a decision to hold sections 307 and 308 unconstitutional. Specifically, defendants assert that Thornburgh was a progeny of Roe and that Casey's discrediting of some aspects of Roe necessarily discredits Thornburgh. We disagree. While we recognize that Casey rejects Roe's trimester framework, Thornburgh does not rely decisively on that framework in invalidating the Pennsylvania statute. Casey admittedly replaces Roe's strict scrutiny with an "undue burden" analysis, and we now invalidate a state abortion regulation only "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." Casey, 112 S. Ct. at 2821. However, Casey explicitly reaffirms Roe's approach to post-viability abortions:

> We also reaffirm Roe's holding that 'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.'

Casey, 112 S.Ct. at 2821 (quoting Roe v. Wade, 410 U.S. 113, 164-65 (1973) (emphasis added)). Casey does not disturb Roe's approach to post-viability regulation. Roe therefore continues to govern the relevant portion of Thornburgh dealing with choice of method restrictions on

post-viability abortions. [9]

In invalidating Pennsylvania's choice of method statute, Thornburgh emphasized that the woman's health must be the physician's "paramount consideration." Thornburgh, 476 U.S. at 768-69. This is consistent with the holding in Roe, reaffirmed in Casey, that limits the state's ability to regulate post-viability abortions when " 'preservation of the life or health of the mother' " is at issue. Casey, 112 S.Ct. at 2821 (quoting Roe, 410 U.S. at 164-65). The importance of maternal health is a unifying thread that runs from Roe to Thornburgh and then to Casey. In fact, defendants concede that Thornburgh's admonition that a woman's health must be the paramount concern remains vital in the wake of Casey. Aplee. Br. at 36 ("Maternal health, not fetal survival, remains the physician's paramount consideration."). The Utah choice of method provisions violate this consistent strain of abortion jurisprudence.

Sections 307 and 308 dictate that the unborn child's life must take precedence over the woman's health absent a risk of "grave damage to her medical health." "Grave damage" is clearly a higher standard than the Supreme Court has articulated. According to Casey, Thornburgh, and Roe, concern for the "preservation" of a woman's health suffices to elevate her liberty interests decisively above those of the state or the unborn child. By requiring a woman to suffer "grave damage" to her health before her liberty interests predominate, the Utah legislature violated those portions of

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[9] We recognize that Casey overruled those portions of Thornburgh that deal with informed consent. See Thornburgh, 476 U.S. at 759-768.

Roe and Thornburgh that Casey reaffirmed, and unconstitutionally devalued a woman's privacy rights.

Defendants argue in the alternative that the Court in Thornburgh invalidated the Pennsylvania statute because it required "the mother to bear an increased medical risk in order to save her viable fetus," Aplee. Br. at 36-37 (quoting Thornburgh, 476 U.S. at 769), and contend that "the Utah statute does not require the mother to bear any increased medical risk in order to save her viable fetus." Aplee. Br. at 37. Defendants correctly note that sections 307 and 308 only affect women who are seeking post-viability abortions "to prevent grave damage to the pregnant woman's medical health" and "to save the pregnant woman's life." Utah Code Ann. § 76-7-302(3).[10] Defendants argue that because "[t]he standard cited in sections 76-7-307 and 308, concerning the need to protect the mother's life and medical health, is the same standard that must be met to permit the post-viability abortion in the first place," Aplee. Br. at 34, "the woman faces no increased risk." Id. at 37. But we have already concluded that section 302(3) is invalid. The "grave damage" standard in sections 307 and 308 no longer has a vital analog in the post-20 week abortion ban. Furthermore, defendants' analysis erroneously conflates the health risks attendant with continued pregnancy and the health risks attendant with a particular abortion method. A woman may opt for a

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[10] Defendants concede that it would be antithetical to legislative intent to assure survival of the unborn child pursuant to sections 307 and 308 when the motivation for the abortion was to prevent "the birth of a child that would be born with grave defects." Utah Code Ann. § 76-7-302(3). Aplee. Br. At 33-34 n.12.

post-viability abortion because continued pregnancy would cause "grave damage" to her health or jeopardize her life. Under the statute, however, she may have to endure additional health damage and suffering if the method most likely to save her unborn child's life, for example Cesarean section, would itself inflict damage, albeit not "grave" damage, on her health. Contrary to defendants' assertion, sections 307 and 308 clearly demand that a woman bear an "increased medical risk" in order to save the life of a viable fetus.

We hold that sections 307 and 308 impose an undue burden upon a woman's right to choose to terminate a pregnancy, and we reverse the district court's disposition of this claim.

V.

Law is a dialectic. Legislatures speak and courts review. In the instant case, the district court violated this separation of powers by ignoring legislative intent with regard to the severability of section 302(3) and rewriting the fetal experimentation ban in section 310. We also hold that the choice of method provisions in sections 307 and 308 unconstitutionally encroach upon the woman's liberty interests. We therefore REVERSE the district court's disposition of these claims. We reject plaintiffs' argument that the serious medical emergency exception, section 315, is not severable from the invalidated portions of the statute and therefore AFFIRM the district court's decision with regard to that section.

We AFFIRM in part and REVERSE in part.

JANE L., on behalf of herself and all others similarly situated; UTAH WOMEN'S CLINIC, P.C.; PLANNED PARENTHOOD ASSOCIATION OF UTAH; DAVID HANSEN, M.D.; MADHURI SHAH, M.D.; JOHN CAREY, M.D.; DAN CHICHESTER, M.D.; KIRTLY PARKER JONES, M.D.; KATHLEEN KENNEDY, M.D.; NEIL K. KOCHENOUR, M.D.; RHONDA LEHR, M.D.; CLAIRE LEONARD, M.D.; KENNETH WARD, M.D.; BONNIE JEANNE BATY, M.D.; SUSAN ELIZABETH LYONS, L.C.S.W.; JANET LYNN WOLF, L.C.S.W.; LESLIE MCDONALD-WHITE, L.C.S.W.; REVEREND DAVID BUTLER; REVEREND BARBARA HAMILTON-HOLWAY; REVEREND GEORGE H. LOWER; REVEREND LYLE D. SELLARDS; REVEREND DOCTOR ALAN CONDIE TULL; REVEREND MARIE SOWARD GREEN; RABBI FREDERICK L. WENGER; JANE J. FREEDOM, (PSEUDO-NAME); JULIE SPOUSE, (PSEUDO-NAME); AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, UTAH SECTIONS; PENNY THOMPSON; WENDY EDWARDS,

Plaintiffs-Appellants,

v.

Norman H. BANGERTER, as Governor of the State of

Utah; PAUL VAN DAM, ATTORNEY GENERAL, as Attorney General of Utah,

Defendants-Appellees.

Civ. No. 91-C-345G

United States District Court
D. Utah, D.C.

Dec. 17, 1992

Janet Benshoof, Rachael Pine, Eve Gartner, New York City, Jeffrey Oritt, Howard Lundgren, Salt Lake City, UT, and Simon Heller, New York City, for plaintiffs.

Mary Anne Wood, Anthony Quinn, James Soper, Paul Durham and Kay Balmforth, Salt Lake City, UT, for defendants.

MEMORANDUM DECISION AND ORDER III-IN RE PORTIONS OF MOTION FOR SUMMARY JUDGMENT

GREENE, J. Thomas, District Judge

This matter came regularly before the Court on April 10, 1992, on defendants' Motion for Summary Judgment. Plaintiffs were represented by Janet Benshoof, Rachel Pine, Eve Gartner, Jeffrey Oritt, Howard Lundgren and Simon Heller. Mary Anne Wood, Anthony Quinn, James Soper, Paul Durham and Kay Balmforth appeared for defendants. Extensive oral argument was heard, after which bench rulings were rendered and later supplemented as to several

issues,[1] and the Court took certain other issues under advisement pending resolution by the Supreme Court of Planned Parenthood v. Casey, --- U.S. ----, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). After that case was decided on June 29, 1992, the parties were permitted to file further memoranda concerning the impact of Casey upon the matters under advisement.

Now being fully advised, the Court enters its Memorandum Decision and Order.

STATUTORY BACKGROUND

During the 1990 General Session of the Utah legislature, three bills to restrict abortion were introduced.[2] The legislature did not formally consider these bills, but decided to study the issue further. To this end, the legislature adopted a resolution, HJR 39, "Abortion Limitation Resolution," stating that the policy of the legislature was to favor childbirth over abortion and to restrict abortion to the extent the Constitution would permit. This resolution

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[1] The bench rulings were memorialized in orders issued April 10, 1992 and supplemented along with other rulings in two Memorandum Decisions. Jane L. v. Bangerter, 794 F.Supp. 1528 (D.Utah 1992); Jane L. v. Bangerter, 794 F.Supp. 1537 (D.Utah 1992).

[2] House Bill 446, House Bill 171 and Senate Bill 270. See Journal of the House of Representatives of the State of Utah, Forty-Eighth Legislature, 1990 General Session at 146, 654; State of Utah, Senate Journal, 1990 General Session of the Forty-Eighth Legislature at 605.

established the "Abortion Task Force Committee," composed of fourteen members of the Utah House and Senate. The Task Force committee held a series of hearings throughout the spring and summer of 1990. Experts in the fields of medicine, law, philosophy, public policy, and political science were invited to testify and to submit data relating to possible abortion legislation. In addition, the Task Force conducted nine public hearings throughout the state in order to elicit public comment on various legislative options concerning abortion. Following these hearings, Senate Bill No. 23, entitled "An Act Relating to Abortion; Prohibiting Abortion Except Under Specified Circumstances," was sponsored by Sen. McAllister, debated and passed within four days, and signed into law by the Governor of Utah on January 25, 1991.

On April 4, 1991, plaintiffs in this action filed a complaint for declaratory judgment and injunctive relief against enforcement of portions of the new and existing Utah Abortion Acts. Shortly thereafter, Senate Bill 23 was amended by Senate Bill 4,[3] and adopted by the Utah legislature in a four hour special session held on April 17, 1991. On May 15, 1991, plaintiffs filed an eight count Amended Complaint seeking invalidation of the entire new Act, and invalidation of certain sections of the Utah Abortion

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[3] Among other things, Senate Bill No. 4 expressly eliminated criminal liability for the woman obtaining an abortion, amended the rape and incest reporting requirements, changed the wording in section 76-7-307 and -308 from "serious and permanent" damage to "grave" damage, and added the requirement that only "intentional" performance of an unauthorized abortion would result in criminal penalties.

Act of 1974. This Court enjoined enforcement of the challenged provisions of the Utah Abortion Acts pending determination of the merits of this litigation.

An extensive record was developed and filed with the Court presenting legislative and historical facts relating to abortions, pregnancies and the Utah statutes in which the liberty interest of women in making the choice to have an abortion is balanced against the state's interest in protecting unborn children. Professional and expert opinions, statistics, social and economic data, and information concerning medical health, religious, family and psychological impacts were set forth in depositions, written summaries, exhibits and other documents all of which were verified and lodged with the Court.

The Utah statutes which were taken under advisement after extensive argument on defendants' Motion for Summary Judgment are as follows:

> 76-7-302. Circumstances under which abortion authorized.
>
> (1) An abortion may be performed in this state only by a physician licensed to practice medicine under the Utah Medical Practice Act or an osteopathic physician licensed to practice medicine under the Utah Osteopathic Medicine Licensing Act and, if performed 90 days or more after the commencement of the pregnancy as defined by competent medical practices, it shall be performed in a hospital.
>
> (2) An abortion may be performed in this state

only under the following circumstances:

(a) in the professional judgment of the pregnant woman's attending physician, the abortion is necessary to save the pregnant woman's life;

(b) the pregnancy is the result of rape or rape of a child, as defined by Section 76-5-402 and 76-5-402.1, that was reported to a law enforcement agency prior to the abortion;

(c) the pregnancy is the result of incest, as defined by Subsection 76-5-406(10) or Section 76-7-102, and the incident was reported to a law enforcement agency prior to the abortion;

(d) in the professional judgment of the pregnant woman's attending physician, to prevent grave damage to the pregnant woman's medical health; or

(e) in the professional judgment of the pregnant woman's attending physician, to prevent the birth of a child that would be born with grave defects.

(3) After 20 weeks gestational age, measured from the date of conception, an abortion may be performed only for those purposes and

circumstances described in Subsections (2)(a), (d) and (e).

(4) The name of a victim reported pursuant to Subsection (b) or (c) is confidential and may not be revealed by law enforcement or any other party except upon approval of the victim. This subsection does not effect or supersede parental notification requirements otherwise provided by law.

76-7-304. Considerations by physician--Notice to minor's parents or guardian or married woman's husband.

To enable the physician to exercise his best medical judgment, he shall:

(1) Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to,

(a) her physical, emotional and psychological health and safety,
(b) her age,

(c) her familial situation.

(2) Notify, if possible, the parents or guardian of the woman upon whom the abortion is to be performed, if she is a minor or the husband of the woman, if she is married.

76-7-307. Medical procedure required to save life of unborn

child.

If an abortion is performed when the unborn child is sufficiently developed to have any reasonable possibility of survival outside its mother's womb, the medical procedure used must be that which, in the best medical judgment of the physician will give the unborn child the best chance of survival. No medical procedure designed to kill or injure that unborn child may be used unless necessary, in the opinion of the woman's physician, to prevent grave damage to her medical health.

76-7-308. Medical skills required to preserve the life of unborn child.

Consistent with the purpose of saving the life of the woman or preventing grave damage to the woman's medical health, the physician performing the abortion must use all of his medical skills to attempt to promote, preserve and maintain the life of any unborn child sufficiently developed to have any reasonable possibility of survival outside of the mother's womb.

76-7-315. Exceptions to certain requirements in serious medical emergency:

When due to a serious medical emergency, time does not permit compliance with Section 76-7-302, Subsection 76-7-304(2) or Subsection 76-7-305(2), the provisions of those sections do not apply.

BACKGROUND FACTS

The following non-adjudicative, legislative or

undisputed facts[4] pertinent to certain matters under advisement support the rulings made herein:

*Utah has kept some of the most meticulous, complete, and accurate abortion statistics in the nation. Brockert Test. ¶¶ 5, 10-11.

*The duration of a pregnancy can be measured from the last menstrual period (LMP) or from conception. Calculation of conception age begins 2 weeks later than LMP. See, e.g., F. Gary Cunningham, Paul C. MacDonald and Norman F. Gant, Williams Obstetrics at 87 (18th ed. 1989). (Defs.' Supp.Mem. of 10/4/92 Ex. B.)

*The Utah legislature calculated gestation age "measured from the date of conception...." Utah Code Ann. § 76-7-302(3) (Supp.1991).

*The statutory cut-off for non-therapeutic abortions is after 20 weeks, which is 21 weeks from the date of conception or 23 weeks LMP. Utah Code Ann. § 76-7-302(3) (Supp.1991).

*Survival as early as 21 weeks gestational age (23 weeks LMP) is possible. Williams Obstetrics, supra, note 1, at 747-48.

*At twenty weeks gestational age, the unborn child is fully developed and is simply maturing in the womb. See Defs.' Trial Ex. A. By twenty weeks gestational age, even the

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[4] See discussion in Jane L. v. Bangerter, 794 F.Supp. 1537, 1540-1541 (D.Utah 1992).

eyelids, eyebrows and fingernails of the unborn child are well developed. DeVore Summ. at 13.

*Based on the record before this Court, there has never been a non-therapeutic abortion performed in the State of Utah after 20 weeks gestational age. Defs.' Trial Ex. G-T.

*If a viable child is aborted and survives, it almost always suffers impairment as a result of prematurity. Williams Obstetrics supra note 1, at 747-48.

*The Utah Women's Clinic, since 1989, performed abortions on only three fetuses after nineteen weeks gestational age, all for severe abnormalities. Pls.' Mem.Opp'n Defs' Mot.Summ. J. Porter Decl. at 2.

*The principal abortionist in the State of Utah, Dr. Madhuri Shah of the Utah Women's Clinic, does not do abortions after 20 weeks gestational age because of the difficulties they pose for herself and her patients. Shah Dep. at 71: 12-21.

*Dilatation and extraction ("D and E") is the safest form of interruption of pregnancy in the second trimester, but it is a technique that requires skilled physicians who perform this procedure on a regular basis. While a number of physicians throughout the United States perform D and E's up through 22 weeks of gestation, there are only a handful of individuals with expertise beyond 22 weeks. Because of the expertise required, this is not a common procedure performed after 22 weeks in the majority of cities throughout the United States. DeVore Summ. at 33.

*Few physicians are willing to perform late term D

and E procedures because the fetus is torn into bits and pieces. Id.

*The more common practice is vaginal delivery through induction of labor. Id. at 34.

*After 22 to 24 weeks gestational period, the difference in the mortality rate between vaginal delivery and D & E is insignificant. DeVore Dep. at 16-17.

The Utah statutes will now be analyzed to determine whether they pass muster in the light of the Supreme Court's ruling in Planned Parenthood v. Casey, --- U.S. ----, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).

ANALYSIS

1. Pre-Viability Abortions

[1] Defendants have conceded that the Utah statutory ban on abortions, at least as it relates to non-therapeutic abortions prior to viability of the fetus, "appears to be unconstitutional"[5] under the guidelines established by the Joint Opinion in Planned Parenthood v. Casey, --- U.S. ----, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).[6] In that case, a majority of the Supreme Court reaffirmed the "essential holding" of Roe v. Wade in all of its three parts, as follows:

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[5] Defendants' Supplemental Reply Brief dated September 14, 1992, at 2.

[6] The Joint Opinion was authored by Justices O'Connor, Kennedy and Souter. Justices Stevens and Blackmun concurred in recognizing the right of women to choose abortion before viability free from any undue burden imposed by the state.

> First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger a woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

Id. at ----, 112 S.Ct. at 2804. The first part of the reaffirmed Roe opinion controls the decision here rendered as to pre-viability abortions. Manifestly, the outright ban (with certain statutory exceptions) as mandated by the Utah statute on abortions by demand prior to the 21 week gestation age would constitute departure from "the essence of Roe's original decision," affirmed by the dicta of the majority in Casey.

As the Court noted in Casey, judges do not have the right or obligation to "mandate our own moral code." Id. at ----, 112 S.Ct. at 2806. Accordingly, this Court holds that Utah Code Ann. § 76-7-302(2) (Supp.1991) insofar as it relates to pre-viability abortions before 21 weeks gestational age constitutes an unconstitutional infringement on a woman's liberty interest under the Due Process Clause of the

Fourteenth Amendment.[7]

2. Post-Viability Abortions

In a separate section of the 1991 abortion statute, the Utah Legislature adopted the period "after 20 weeks gestational age" (23 weeks LMP) as the point beyond which abortions could not be performed, except to protect the mother's life, to prevent grave damage to maternal health or to prevent grave birth defects. Utah Code Ann. § 76-7-302(3).

a. Severability of § 76-7-302(3)

[2] Plaintiffs have urged that because Casey invalidates section 76-7-302(2), and because section 76-7-302(3) incorporates part of the invalidated statute (subsections 2(a), (d) and (e)), section 76-7-302(3) must also be struck down as unconstitutional. This argument lacks merit. Subsections (a), (d) and (e) have only been invalidated by this Court as they relate to the ban on pre-viability abortions in section 76-7-302(2). In any event, those

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[7] In Sojourner T. v. Edwards, 974 F.2d 27 (5th Cir.1992), the Fifth Circuit struck down a Louisiana statute banning abortions except to preserve the life or health of an unborn baby, remove a dead child, save the life of the mother, or when the pregnancy is the result of rape or incest, and certain reporting requirements are met. The Louisiana statute prohibited all abortions, so as written it was declared to be facially unconstitutional. The court did not address the distinction between pre-viable and post-viable fetuses which comes into play under the Utah statute.

subsections are a part of section 76-7-302(3) as to post-viability abortions by reference and stand independent of the provisions of Utah Code Ann. 76-7-302(2) as to pre-viability abortions. Under section 76-7-302(3), the subsections constitute the "purposes and circumstances" under which post-viability abortions may be performed.

The Utah legislature enacted a severability clause relative to the abortion statute which would preserve every "provision, section, subsection, sentence, clause, phrase or word" not declared unconstitutional.[8] The Utah Supreme Court has held that a section of a statute may be severed from an invalidated statute if "the remaining portions of the act can stand alone and serve a legitimate purpose." Berry v. Beech Aircraft, 717 P.2d 670, 686 (Utah 1985). Accord, Utah Technology Finance Corp. v. Wilkinson, 723 P.2d 406, 414 (Utah 1986). In this case the post-viability requirements are entirely separate from the pre-viability requirements, and can

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[8] Utah Code Ann. § 76-7-317 provides:

If any one or more provision, section, subsection, sentence, clause, phrase or word of this part or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable and the balance of this part shall remain effective notwithstanding such unconstitutionality. The legislature hereby declares that it would have passed this part, and each provision, section, subsection, sentence, clause, phrase or word thereof, irrespective of the fact that any one or more provision, section, subsection, sentence, clause, phrase, or word be declared unconstitutional.

stand alone. As for the requirement that subsection 76-7-302(3) serve a legitimate purpose, the Supreme Court recognized in Roe that a state can prohibit abortion after viability as long as there are exceptions, as there are here, "when it is necessary to preserve the life or health of the mother." Roe v. Wade, 410 U.S. 113, 164, 93 S.Ct. 705, 732, 35 L.Ed.2d 147 (1973).

b. Facial Challenge

[3, 4] The well-established rule of the Supreme Court concerning facial challenges has application here: "[A] facial challenge must be rejected unless there exists no set of circumstances in which the statute can be constitutionally applied." United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987).[9] This rule was not applied as such by the majority of the Supreme Court in Casey. Instead, it seems that in some contexts the majority, sub silentio, abandoned the traditional facial challenge approach in favor of an undue burden standard.[10] It is

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[9] See discussion of facial challenge in the context of Utah's "serious medical emergency" statute, infra at 877-878.

[10] In the context of Pennsylvania's 24 hour waiting period statute, the Court appears to have combined facial challenge analysis with the undue burden test. However, with regard to the spousal notification statute, the Court did not determine whether the law had any constitutional applications as Salerno requires. The Court stated instead that "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." Casey, --- U.S. at ----, 112 S.Ct. at 2829. See discussion at note 27.

therefore unclear whether the majority would refuse to apply traditional facial challenge analysis to all pre-viability, non-therapeutic abortions.[11] It appears to this Court that such analysis has forceful application in late abortions at or near the viability line.

Justice Scalia pointed out in connection with the Supreme Court's recent refusal to grant certiorari in Ada v. Guam Society of Obstetricians & Gynecologists, --- U.S. ----, 113 S.Ct. 633, 121 L.Ed.2d 564 (1992), that Casey did not alter such facial challenge analysis, and said:

> Facial invalidation based on overbreadth impermissibly interferes with the state process of refining and limiting-through judicial decision or enforcement discretion-statutes that cannot be constitutionally applied in all cases covered by their language. And it prevents the State (or territory) from punishing people who violate a prohibition that is, in the context in which it is applied, entirely constitutional.

Id. at ----, 113 S.Ct. at 634. While this observation was made in dissent, joined by the Chief Justice and Justice White, it reiterates the familiar rule of law which continues to be

[11] The Court in Casey observed that, "[a] finding of undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Casey, --- U.S. at ----, 112 S.Ct. at 2820 (emphasis added).

binding upon lower courts.

It is clear that the Utah statute can be applied constitutionally in the vast majority of cases. This is because the Utah statutory prohibition of abortions at 21 weeks gestational age corresponds with the time when the unborn child is capable of independent existence, being fully developed and simply maturing in the womb. As to such fetal life, the statute amply withstands a facial challenge. To strike it down based upon an implausible scenario of abortions of unviable fetuses after 20 weeks[12] would require this Court impermissibly to resort to the doctrine of "overbreadth." The Supreme Court has consistently refused to apply the doctrine of overbreadth beyond the First Amendment context. United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987) (citations omitted). See also, Rust v. Sullivan, --- U.S. ----, ----, 111 S.Ct. 1759, 1767, 114 L.Ed.2d 233 (1991).

c. Viability

The Court in Casey fixed the point of viability as a fair and appropriate line of demarcation wherein the interest of the State in unborn children exceeds the liberty interest of a woman in the abortion choice. In this regard, the majority in Casey declared that "viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on non-therapeutic abortions," --- U.S. at ----, 112 S.Ct. at 2811 (emphasis

[12] Based on the record before the Court, there have been no cases of non-therapeutic abortions after 20 weeks in Utah.

added), and that viability constitutes the point at which "there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection...." Id. at ----, 112 S.Ct. at 2817 (emphasis added).

A compelling reason set forth in Casey to uphold limitations or restrictions on post-viability abortions is that by then a woman may fairly be deemed to have consented to the exercise of the state's interest in protection of life. The three authors of the Joint Opinion said in this regard:

> The viability line also has, as a practical matter, an element of fairness. In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.

Id. at ----, 112 S.Ct. at 2817.

In establishing the viability line, the court in Casey rejected the "rigid trimester framework of Roe v. Wade." Id. ----, 112 S.Ct. at 2821. Dicta set forth in cases which derived from the trimester framework would seem to invalidate Utah's line of demarcation based upon gestational age.[13] However, in

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[13] In Planned Parenthood v. Danforth, 428 U.S. 52, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976), the Supreme Court stated, "it is not the proper function of the legislature or the courts to place viability ... at a specific point in the gestation period." In Colautti v. Franklin, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979), the Court reiterated this position and

a more recent case the Supreme Court upheld a Missouri statute[14] which "create[d] what is essentially a presumption of viability at 20 weeks." Webster v. Reproductive Health Service, 492 U.S. 490, 515, 109 S.Ct. 3040, 3055, 106 L.Ed.2d 410 (1989).[15] The statute in Webster was upheld in

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stated,

> Because this point may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability--be it weeks of gestation or fetal weight or any other single factor--as the determinant of when the State has a compelling interest in the life or health of the fetus.

Id. at 388-89, 99 S.Ct. at 682.

[14] The statute in Webster provided in relevant part:

> Before a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable....

Mo.Rev.Stat. § 188.029 (1986).

[15] In Webster, Chief Justice Rehnquist referred to previous trimester-based cases and said,

> We think the doubt cast upon the Missouri statute by these cases is not so much a flaw in the statute as it is a reflection of the fact that the rigid trimester analysis of the course of a pregnancy enunciated in Roe has resulted in subsequent cases like Colautti and Akron

an opinion by the Chief Justice, joined by Justices White and Kennedy, because it was "reasonably designed to ensure that abortions are not performed when the fetus is viable." 492 U.S. at 520, 109 S.Ct. at 3058. Justice O'Connor concurred in the judgment as to this part (II-D) of the opinion, stating, "all nine members of the Thornburgh Court appear to have agreed that it is not constitutionally impermissible for the State to enact regulations designed to protect the State's interest in potential life when viability is possible." Id. at 528, 109 S.Ct. at 3062 (emphasis added). Justice Scalia also concurred in the judgment.

The Utah statute was reasonably designed to take effect at a time when life outside the womb is possible. In this regard, the gestational age line drawn in the Utah statute corresponds with the time of possible fetal survival. The Court in Casey observed that given the advances in neonatal care since the era of Roe, viability may now be reached at "23 to 24 weeks," --- U.S. at ----, 112 S.Ct. at 2811. This is the equivalent of 21 to 22 weeks gestational age (23 to 24 weeks LMP) as defined in the Utah statute.[16]

> [v. Akron Center for Reproductive Health, Inc., 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687] making constitutional law in this area a virtual Procrustean bed.

Id. at 517, 109 S.Ct. at 3056. In Casey, a majority of the Supreme Court joined in abandoning the trimester framework. --- U.S. at ----, 112 S.Ct. at 2808. See discussion at 874-875, infra.

[16] The Utah prohibition takes effect "after 20 weeks gestational age," which at the earliest would be 21 weeks gestational age. Utah Code Ann. § 76-7-302(3) (Supp.1991).

d. Undue Burden

On the record before the Court, non-therapeutic abortions after the 20 week gestational period are not performed and have never been performed in Utah. Moreover, plaintiffs have submitted no evidence that any woman wants or has attempted to obtain such a late non-therapeutic abortion, and doctors generally avoid the trauma of such late abortions because of risks and difficulties to the woman and fetus. Therefore, under the Casey rationale, the statutory provision is not "likely to prevent a significant number of women from obtaining an abortion," nor can it be found that "for many women, it will impose a substantial obstacle." Id. at ----, 112 S.Ct. at 2829. Twenty weeks certainly constitutes fair notice to the woman of the abortion ban to be imposed, and her consent to abide by the ban except for health reasons fairly can be implied.

Based upon the foregoing, and on the record presented, it seems clear that Utah's prohibition of such late, non-therapeutic abortions does not impose an undue burden on a woman's liberty interest, whether the fetus is non- viable or viable after the 20 week period.[17]

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[17] Plaintiffs have also challenged the requirement in section 76-7-302(3) that the fetus' life be favored except when necessary to prevent "grave damage" to the mother's health. They claim this is inconsistent with Casey's mandate that the woman's health not be "endangered." Casey, --- U.S. at ----, 112 S.Ct. at 2804. This Court has upheld the constitutionality of the use of "grave damage" in a similar context infra, at note 20. That analysis applies with equal force here.

3. Standards Physicians are Required to Follow When Aborting a Potentially Viable Fetus

Two provisions[18] in the Utah law require that the medical procedure and the medical skills used in a post-viability abortion must be calculated, in the "best medical judgment of the physician,"[19] to give the unborn child the "best chance of survival," while at the same time preventing the pregnant woman's death or grave damage to her health.

[5] Plaintiffs allege that these statutes are unconstitutional pursuant to the decision of the Supreme Court in Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986).[20] In that case, the Court held that a Pennsylvania

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[18] Utah Code Ann. §§ 76-7-307 and -308. These provisions are set out in full supra.

[19] In the exercise of "best medical judgment," the physician is required under the statute to "(1) Consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed including, but not limited to, (a) her physical, emotional and psychological health and safety, (b) her age, (c) her familial situation." Utah Code Ann. § 76-7-304 (Supp.1991).

[20] Plaintiffs also argue that the statutes are unconstitutional because the language permitting abortion of a viable fetus in the case of "grave damage to the woman's health" conflicts with statements in Roe (reiterated in Casey) that the State can only regulate or proscribe abortions after

statute was facially unconstitutional because it" 'require[d] the mother to bear an increased medical risk in order to save her viable fetus.'" Id. at 769, 106 S.Ct. at 2183 (citing Colautti v. Franklin, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979)). In Colautti, the Court did not actually rule such a trade-off to be unconstitutional, but the majority recognized "serious ethical and constitutional difficulties, that we do not address," in statutory language requiring a physician "to make a 'trade-off' between the woman's health and additional percentage points of fetal survival." Colautti, 439 U.S. at 400, 99 S.Ct. at 688. Although in purporting to follow Colautti, Thornburgh, appears to decide the issue, the case was called into question in the recent Casey opinion, and for reasons set forth hereinafter, this Court considers Thornburgh to be substantially undermined and not controlling to invalidate the Utah statute.[21]

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viability "if the law contains exceptions for pregnancies which endanger a woman's life or health." Casey, --- U.S. at ----, 112 S.Ct. at 2804 (emphasis added). The claim is that by the time the level of "grave damage" is reached, a woman's health would already be "endangered." However, the definition of "endanger," "to expose to danger or harm: imperil," Webster's II New Riverside University Dictionary 431 (1988), is not unlike the meaning of "grave" damage, "fraught with danger or harm." Id. at 546. The requirement in section 76-7-302(3) that the physician avoid "grave damage" to the woman's health is consistent with the Supreme Court's mandate that an exception be provided to permit abortion of a viable fetus if the woman's health is "endangered."

[21] Only the Supreme Court can overrule one of its own precedents. Thurston Motor Lines, Inc. v. Jordan K. Rand,

Authors of the Joint Opinion in Casey discarded the trimester approach set forth in Roe v. Wade as unnecessary because "we do not consider [it] to be part of the essential holding of Roe." Casey, --- U.S. at ----, 112 S.Ct. at 2818.[22] The authors of the Joint Opinion also said, "The trimester framework suffers from these basic flaws: in its formulation it misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in Roe." Id.

As a result of the Court's decision in Casey, the "rigid constraint" set forth in the trimester framework is no longer the law of the land, and cases which have struck down abortion regulations on the basis of applying the trimester framework can no longer be regarded as controlling.[23] This is significant because, as noted in the Joint Opinion, "[m]ost of

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Ltd., 460 U.S. 533, 535, 103 S.Ct. 1343, 1344, 75 L.Ed.2d 260 (1983). However, "if later Supreme Court decisions indicate to a high degree of probability that the Court would repudiate the prior ruling if given the opportunity, a lower court need not adhere to the precedent." Levine v. Heffernan, 864 F.2d 457 (7th Cir.1988) (citations omitted) (cert. denied, 493 U.S. 873, 110 S.Ct. 204, 107 L.Ed.2d 157 (1989)).

[22] This part (Part IV) of the Joint Opinion commanded only a minority of three of the court, but the four dissenting Justices concurred in the result of abandoning the trimester framework.

[23] The authors of the Joint Opinion disapproved those parts of Thornburgh which are "inconsistent with Roe's acknowledgment of an important interest in potential life...." Casey, --- U.S. at ----, 112 S.Ct. at 2823.

our cases since Roe have involved the application of rules derived from the trimester framework." Id. at ----, 112 S.Ct. at 2818 (citing Thornburgh and Akron I). The Court said that such cases cannot be reconciled with the holding of Roe itself "that the state has legitimate interests in the health of the woman and in protecting the potential life within her." Id. at ----, 112 S.Ct. at 2817.

[6, 7] The practical effect of the rejection of the trimester framework is that states will now have much greater leeway to pass regulations that impinge to some degree upon the woman's right to non-therapeutic, pre-viability abortions.[24] In addition, these regulations will be upheld unless they constitute a "substantial obstacle" to the woman's right to choose to abort a nonviable fetus in view of the formal acceptance and delineation of the undue burden test. Id. at ----, 112 S.Ct. at 2820.[25] As the Third Circuit recently noted,

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[24] The Court in Casey declared,

A logical reading of the central holding in Roe itself, and a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life.

--- U.S. at ----, 112 S.Ct. at 2818.

[25] In Thornburgh and other post-Roe-pre-Webster cases, the woman's right to an abortion was regarded as fundamental, so very few abortion regulations survived strict scrutiny. In Casey the Court revised the woman's right to abortion from a virtually unassailable fundamental right subject to strict scrutiny review to a liberty interest subject to

"when a majority of the Justices announce in the course of deciding a case that they are substituting a new standard or result for that used in a prior case, the substitution is effected, and the lower courts are thereafter bound to follow the new standard or result." Planned Parenthood v. Casey, 947 F.2d 682, 692 (3rd Cir.1991). This Court therefore abandons strict scrutiny review as required in Roe in favor of the undue burden test as adopted in Casey relative to pre-viability, non-therapeutic abortions.

It appears to this Court that the greater importance set forth in Casey upon the State's interest in potential fetal life, and the corresponding decreased weight given to the woman's right to abortion, extend with even more force into the area of post-viability abortions where the State's interest in fetal life becomes compelling. Utah's post-viability abortion provisions square with the emphasis in Casey on the State's interest in viable fetal life. Further, a safety valve exists in the Utah statutory scheme in that in any abortion the physician is required to "consider all factors relevant to the well-being of the woman upon whom the abortion is to be performed."[26] The statutes in question only become operative "when the unborn child is sufficiently developed to have any reasonable possibility of survival outside its mother's womb" and require the physician to favor the survival of the fetus "consistent with the purpose of saving the life of the woman or preventing grave damage to her health."

Based upon the foregoing, this Court finds Utah Code

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undue burden analysis.

[26] Utah Code Ann. § 76-7-304(1). See discussion at 879.

Ann. §§ 76-7-307, 308 (Supp.1991) to be facially valid and to bear a rational relationship to the legitimate state interest in preservation of viable fetal life.

4. Spousal Notification

[8] The fourth provision of the Utah Abortion Act under consideration is section 76-7-304, the spousal notification requirement. A majority of the Supreme Court struck down a somewhat similar spousal notification requirement in Casey. The Pennsylvania statute at issue in that case mandated that a married woman desiring an abortion provide the physician with either a signed statement that she has notified her spouse that she intends to have an abortion, or a signed statement that her husband was not the one who impregnated her; that her husband could not be located; that the pregnancy is the result of spousal sexual assault which she has reported; or that the woman believes that notification will result in bodily injury. 18 Pa.Cons.Stat.Ann. § 3209 (1990).

The Utah statute provides that spousal notice be given by the pregnant woman's physician, rather than by herself. Also, the Utah statute requires notification to the husband "if possible." Defendants contend that the statute is facially valid because it has been on the books for 18 years without any evidence that it has prevented any abortions[27], the

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[27] The Supreme Court in Casey approached the facial challenge of the Pennsylvania spousal notification statute in a way that seems to avoid the well-established requirement that the plaintiff " ' show that no set of circumstances exists under which the [provision] would be valid.' " Casey, --- U.S. at ----, 112 S.Ct. at 2870 (citation omitted). The Court

physician and not the pregnant woman gives notice if such is to be given, and the statute contains a broad and expansive exception which requires notice only "if possible."

In this Court's opinion, the giving of notice by the woman's physician rather than by the woman constitutes a distinction without a difference. The same abuse from violent and dangerous husbands could be expected whether the notice comes from the woman or the woman's physician. As to the arguably broad "if possible" exception, the Utah Supreme Court interpreted the statute in effect to require notification not only if possible, but if at all possible.[28] See H.L. v. Matheson, 450 U.S. 398, 405, 101 S.Ct. 1164, 1169, 67 L.Ed.2d 388 (1981) (citing H.L. v. Matheson, 604 P.2d 907, 913 (Utah 1979)).

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conceded that the statute might affect "fewer than one percent of women seeking abortions." Id. at ----, 112 S.Ct. at 2829. However, the Court went on to state:

> The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects.... The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.... [I]n a large fraction of the cases in which § 3209 is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid.

Id. at ----, 112 S.Ct. at 2829-30.

[28] In H.L. v. Matheson, 604 P.2d 907, 913 (1979) the Utah Supreme Court said:

> There is no ambiguity in the term "if possible" within the context of subsection (2); and, therefore, there is no basis to construe the term beyond its literal, plain meaning. The trial court's interpretation is consistent with the clearly expressed legislative intent, viz., the consulting physician must notify the parents, if under the circumstances, in the exercise of reasonable diligence, he can ascertain their identity and location and it is feasible or practicable to give them notification.

The Supreme Court analogized the Pennsylvania spousal notification requirement, despite its extensive exceptions, to the spousal consent requirement invalidated in Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 74, 96 S.Ct. 2831, 2843, 49 L.Ed.2d 788 (1976).[29] The

[29] The statute in Danforth required prior written consent of the spouse of the woman seeking an abortion during the first 12 weeks of pregnancy, unless "the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother." Danforth, 428 U.S. at 67-68, 96 S.Ct. at 2840. The Court struck down this statute on the grounds that "we cannot hold that the State has the constitutional authority to give the spouse unilaterally the ability to prohibit the wife from terminating her pregnancy, when the State itself lacks that right." Id. at 70, 96 S.Ct. at 2841.

majority of the Supreme Court then adopted what appears to be an unequivocal position on the unconstitutionality of spousal notification statutes, stating:

> The spousal notification requirement is likely to prevent a significant number of women from obtaining an abortion.... [I]t will impose a substantial obstacle. We must not blind ourselves to the fact that a significant number of women who fear for their health and safety as well as the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortions in all cases.

Casey, --- U.S. at ----, 112 S.Ct. at 2829. The same principles apply to the Utah statute.[30]

Conceivably, a spousal notification statute with appropriate exceptions could be found to be constitutional. However, that situation is not presented here.[31] In line with

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[30] In striking down the Pennsylvania spousal notification statute, the Supreme Court relied primarily on national information and statistics to "reinforce what common sense would suggest." Casey, --- U.S. at ----, 112 S.Ct. at 2828. This Court assumes that essentially the same information, statistics and common sense would apply to Utah.

[31] If the Utah legislature had defined, or the Utah Court had construed, "if possible" expansively as the plaintiff urged in H.L. v. Matheson, that is, "as conferring on the consulting physician discretion to determine if medically, socially, psychologically, and physically, it would be

Casey, this Court holds section 76-7-304 to be an unconstitutional infringement upon the woman's liberty interest.

5. Serious Medical Emergency

[9] The final provision at issue is the "serious medical emergency" statute. Utah Code Ann. § 76-7-315 (Supp.1991). When such an emergency exists, this statute excuses compliance with requirements otherwise mandated by the legislature, such as the notification requirements of subsection 76-7-304(2), and the consent requirements of subsection 76-7-305(2).[32]

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appropriate to notify...." 604 P.2d at 912, the spousal notification statute might withstand constitutional challenge. As interpreted by the Utah Supreme Court in Matheson, however, the exception to notification set forth in the Utah law is less broad than in Pennsylvania.

[32] Section 76-7-305(2) provides:

(2) No consent obtained pursuant to the provisions of this section shall be considered voluntary and informed unless the attending physician has informed the woman upon whom the abortions is to be performed:

(a) Of the names and addressed of two licensed adoption agencies in the state of Utah and the services that can be performed by those agencies, and nonagency adoption may be legally arranged; and

(b) Of the details of development of unborn children and abortion procedures, including and foreseeable complications, risks, and the nature of the post-operative recuperation period; and

(c) Of any other factors he deems relevant to a

a. Core Meaning

Plaintiffs have challenged this statute on grounds of unconstitutional vagueness. They claim that the term "serious medical emergency" is incapable of definition and that the absence of a mens rea provision creates potential criminal liability because of uncertainty as to whether the statute embodies an objective or a subjective standard of "serious medical emergency."

[10] The test applied to statutes challenged for vagueness is whether "men of common intelligence must necessarily guess at its meaning and differ as to its application." Baggett v. Bullitt, 377 U.S. 360, 367, 84 S.Ct. 1316, 1320, 12 L.Ed.2d 377 (1964). This test incorporates the requirements that notice be given to individuals of prohibited conduct, Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983), and that sufficient guidance be given to enforcement officials to avoid "arbitrary and discriminatory enforcement." Id. With respect to these two concerns, the Court stated,

> Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the

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voluntary and informed consent.
Section 76-7-315 also excuses compliance with section 76-7-302, a portion of which (§ 76-7-302(2)) this Court strikes down as unconstitional in this Memorandum Decision and Order.

> doctrine - the requirement that a legislature establish minimal guidelines to govern law enforcement." Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections."

Id. at 357-358, 103 S.Ct. at 1858 (quoting Smith v. Goguen, 415 U.S. 566, 574-575, 94 S.Ct. 1242, 1248, 39 L.Ed.2d 605 (1974).

[11, 12] In the context of a facial challenge[33] such as this, plaintiffs have a more difficult burden of proof. Plaintiffs must establish that the challenged law is "impermissibly vague in all of its applications." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982). In other words, that the law is "utterly devoid of a standard of conduct so that it 'simply has no core' and cannot be validly applied to any conduct." High Ol' Times, Inc. v. Busbee, 673 F.2d 1225, 1228 (11th Cir.1982). If persons of reasonable intelligence can determine a core meaning, "the enactment may validly be applied to conduct within that meaning and the possibility of a valid application precludes facial

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[33] The Supreme Court has observed that " '[a] facial challenge ... is ... the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.' " Rust v. Sullivan, --- U.S. ----, ----, 111 S.Ct. 1759, 1767, 114 L.Ed.2d 233 (1991) (quoting United States v. Salerno, 481 U.S. 739, 745, 107 S.Ct. 2095, 2100, 95 L.Ed.2d 697 (1987).

invalidity." Id. (quoting Brache v. County of Westchester, 658 F.2d 47, 51 (2nd Cir.1981), cert. denied, 455 U.S. 1005, 102 S.Ct. 1643, 71 L.Ed.2d 874 (1982)).

With regard to the argument that the term "serious medical emergency" has no core meaning, it is apparent to the Court that physicians routinely are confronted with emergencies and as a part of their training can recognize them. In a prior Memorandum Decision and Order in this case, this Court followed Supreme Court precedent in finding a core meaning for such terms as "necessary to save a mother's life" and "grave damage to the woman's medical health," because definition of these terms is a "routine question for the professional judgment of the attending physician." Jane L. v. Bangerter, 794 F.Supp. 1537, 1542 (D.Utah 1992).

b. Mens Rea

In addition to the existence of a core meaning for the terms used in the Utah statute, whatever ambiguity inheres in the term "serious medical emergency" is cured by the presence of a mens rea statute which requires scienter on the part of the physician before criminal liability attaches. The Supreme Court has stated that "a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." Flipside, 455 U.S. at 499, 102 S.Ct. at 1193.[34]

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[34] The Court cited a law review article for the proposition that not every scienter requirement will suffice to mitigate a law's vagueness:

> [I]t is evident that ... the scienter meant must

The mens rea statute applicable to the serious medical emergency statute, section 76-7-314, requires intentional[35]

> be some other kind of scienter than that traditionally known to the common law-the knowing performance of an act with intent to bring about that thing, whatever it is, which the statute proscribes, knowledge of the fact that it is so proscribed being immaterial.... Such scienter would clarify nothing; a clarificatory "scienter" must envisage not only a knowing of what is done but a knowing that what is done is unlawful or, at least, so "wrong" that it is probably unlawful.

Flipside, 455 U.S. at 499 n. 14, 102 S.Ct. at 1193 n. 14 (quoting Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U.Pa.L.Rev. 67, 87 n. 98 (1960)).

[35] By definition (section 76-7-301) as well as penalty (section 76-7-314), performance of an abortion in violation of the "serious medical emergency" statute would have to be "intentional":

> 76-7-301. Definitions.
> As used in this part:
> (1) "Abortion" means the intentional termination or attempted termination of human pregnancy....
> 76-7-314. Violations of abortion laws--Classifications.
> (1)(a) Any person who intentionally performs an abortion other than authorized by this part is guilty of a felony of the third degree.... (Emphasis added).

performance of an unauthorized[36] abortion before a person performing an abortion could be prosecuted. The Legislature of Utah imposed this scienter requirement so that a physician would intentionally have to abort a fetus when the physician knew that a serious medical emergency did not exist. In a similar context, the Third Circuit said:

> [T]he statute requires a physician to violate his or her own good faith clinical judgment in order to be criminally liable. This is a subjective, not an objective standard.... We fail to see how any physician practicing in good faith could fear conviction under the Act.

Planned Parenthood v. Casey, 947 F.2d 682, 702 (3rd Cir.1991). In the instant case, the subjective good faith judgment of an attending physician who perceives a "serious medical emergency" to exist would also constitute a defense to a criminal charge under the Act.

Plaintiffs cite Colautti v. Franklin, 439 U.S. 379, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979) in support of their proposition that the mens rea provision in section 76-7-315 is inadequate. In Colautti, the Supreme Court held (among other things) that section 5(a) of the Pennsylvania Abortion Control Act, 1974 Pa.Laws, Act No. 209, (Purdon 1977), was

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[36] Utah Code Ann. § 76-7-314 imposes criminal liability upon any person "who intentionally performs an abortion other than authorized...." (Emphasis added). Abortions performed "when due to a serious medical emergency" are authorized under Utah Code Ann. 76-7-315.

unconstitutionally vague and that the general mens rea requirement in section 2501, Pa.Stat.Ann., Tit. 18 (Purdon 1973 and Supp.1978), did not cure that vagueness.

The Utah mens rea statute differs from the Pennsylvania statute in one crucial respect. The required mental state under the Pennsylvania statute was "intentionally, knowingly, recklessly or negligently caus[ing] the death of another human being." § 2501 (1973). Therefore, as the Supreme Court noted, "the Pennsylvania law of criminal homicide requires scienter with respect to whether the physician's actions will result in the death of the fetus ... [but it does not require] that the physician be culpable in failing to find sufficient reason to believe that the fetus may be viable." Colautti, 439 U.S. at 394-395, 99 S.Ct. at 685. In contrast, the Utah statute conditions liability upon intentional abortion of a fetus when the physician knew that a serious medical emergency was not present. This type of mens rea requirement "relieves[s] the statute of the objection that it punishes without warning an offense of which the accused was unaware" and preserves section 76-7-315 from a vagueness challenge. Screws v. United States, 325 U.S. 91, 101-102, 65 S.Ct. 1031, 1035-1036, 89 L.Ed. 1495 (1945).

c. Best Medical Judgment-Well Being of Woman

In addition to the existence of a mens rea provision requiring scienter, this Court reads section 76-7-304 (set out in full supra) to express the legislature's intent that the physician's "best medical judgment" must always be brought to bear upon any abortion-related decision. This section details some of the factors relevant to the well-being of the woman which the physician shall consider in the exercise of his or her best medical judgment, and does not limit the scope

of these considerations to any particular circumstances. As noted in this Court's earlier memorandum decisions, the Supreme Court has upheld the constitutionality of statutes which permit the physician's best medical judgment to determine the necessity of abortion. See e.g., United States v. Vuitch, 402 U.S. 62, 69-70, 91 S.Ct. 1294, 1298, 28 L.Ed.2d 601 (1971) (statute permitting abortion when necessary in physician's judgment to preserve health of woman was not void for vagueness); Doe v. Bolton, 410 U.S. 179, 191-192, 93 S.Ct. 739, 747, 35 L.Ed.2d 201 (1973) (statute requiring determination of necessity of abortion based upon attending physician's best clinical judgment not void for vagueness).

As against a similar challenge to a "medical emergency" law, the District Court in Casey invalidated the statute finding that there were three serious conditions which would not be covered thereunder: preeclampsia, inevitable abortion, and prematurely ruptured membrane. Planned Parenthood v. Casey, 744 F.Supp. 1323, 1378 (E.D.Pa.1990). The Third Circuit reversed, and in rejecting the vagueness claim stated:

> [W]e read the medical emergency exception as intended by the Pennsylvania legislature to assure that compliance with its abortion regulations would not in any way pose a significant threat to the life or health of a woman. We believe it should be interpreted with that objective in mind. While the wording seems to us carefully chosen to prevent negligible risks to life or health or significant risks of only transient health problems from serving as an excuse for

> noncompliance, we decline to construe "serious" as intended to deny a woman the uniformly recommended treatment for a condition that can lead to death or permanent injury.

Planned Parenthood v. Casey, 947 F.2d 682, 701 (3rd Cir.1991). The Supreme Court affirmed the Court of Appeals and declared that its interpretation did not amount to "plain error," Casey, --- U.S. at ----, 112 S.Ct. at 2822 (citing Palmer v. Hoffman, 318 U.S. 109, 118, 63 S.Ct. 477, 482, 87 L.Ed. 645 (1943), Brackett v. Spokane Arcades, Inc., 472 U.S. 491, 499-500, 105 S.Ct. 2794, 2799-2800, 86 L.Ed.2d 394 (1985) and Frisby v. Schultz, 487 U.S. 474, 482, 108 S.Ct. 2495, 2501, 101 L.Ed.2d 420 (1988)). A majority of the Court joined in the conclusion that the medical emergency definition "imposes no undue burden on a woman's abortion right." Id. This Court reads the Utah medical emergency exception as intended by the Utah legislature to assure that compliance with its abortion regulation would not in any way pose a significant threat to the life or health of a woman, and interprets the phrase "serious medical emergency" to include the serious conditions which are not expressly covered by the statute. Further, since the professional clinical judgment of the physician necessarily is implicated in his or her intentional determination of the existence or non-existence of a "serious medical emergency," the absence of a specific provision embracing the physician's professional judgment is of little import. This Court holds that the Utah medical emergency statute provides the fair warning to physicians required by the Due Process Clause, sets clear guidelines for enforcement officials, and is therefore not void for vagueness.

Based upon the foregoing, it is hereby

ORDERED, that Utah Code Ann. § 76-7-302(2) and Utah Code Ann. § 76-7-304 are declared to be unconstitutional under the United States Constitution. It is,

FURTHER ORDERED, that Utah Code Ann. §§ 76-67-302(3), 76-7-307, 76-7-308, and 76-7-315 are upheld as constitutional under the Constitution of the United States.

Counsel for defendants are directed to prepare and lodge with the Court a form of Judgment consistent with this opinion after first complying with local rule 206(b).

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JANE L., on behalf of herself and all others similarly situated; UTAH WOMEN'S CLINIC, P.C.; PLANNED PARENTHOOD ASSOCIATION OF UTAH; DAVID HANSEN, M.D.; MADHURI SHAH, M.D.; JOHN CAREY, M.D.; DAN CHICHESTER, M.D.; KIRTLY PARKER JONES, M.D.; KATHLEEN KENNEDY, M.D.; NEIL K. KOCHENOUR, M.D.; RHONDA LEHR, M.D.; CLAIRE LEONARD, M.D.; KENNETH WARD, M.D.; BONNIE JEANNE BATY, M.D.; SUSAN ELIZABETH LYONS, L.C.S.W.; JANET LYNN WOLF, L.C.S.W.; LESLIE MCDONALD- WHITE, L.C.S.W.; DAVID BUTLER, Reverend; BARBARA HAMILTON-HOLWAY, Reverend; GEORGE H. LOWER, Reverend; LYLE D. SELLARDS, Reverend; ALAN CONDIE TULL; Reverend Doctor; MARIE SOWARD GREEN; FREDERICK L. WENGER, Rabbi; JANE J. FREEDOM, (PSEUDO-NAME); JULIE SPOUSE, (PSEUDO-NAME); AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, UTAH SECTIONS; PENNY THOMPSON; WENDY EDWARDS,

Plaintiffs-Appellants,

v.

NORMAN H. BANGERTER, as Governor of the State of Utah; PAUL VAN DAM, Attorney General, as Attorney General of Utah,

Defendants-Appellees.

Nos. 93-4044, 93-4059 93-4145

ORDER
Entered November 6, 1995

Before SEYMOUR, Chief Judge, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, BRISCOE and LUCERO, Circuit Judges, and BROWN, District Judge.*

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*The Honorable Wesley E. Brown, District Judge, United States District Court for the District of Kansas, sitting by designation.

This matter comes on for consideration of appellees' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in

regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court
PATRICK FISHER, Clerk

By:_____
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH - CENTRAL DIVISION

JANE L., et al.,

Plaintiff,

vs.

NORMAN BANGERTER, et al.,

Defendants

ORDER ON REMAND RE ATTORNEY'S FEES (JANE l. V)

Civil No. 91-C-345G

This matter is before the court on remand by the Tenth Circuit for recalculation of attorney's fees in accordance with opinions issued by that court concerning error in the lower court's substantive decisions as well as its award of attorney's fees to defendants. As instructed by the Tenth Circuit, this requires reversal of reductions in the lodestar calculation on account of failure to prevail on alternative legal theories, and reconsideration of limited success as determined by the lower court. It also requires reversal of this court's award of attorney's fees and expenses to defendants.

I.

LODESTAR CALCULATION

This court arrived at a lodestar calculation for plaintiffs' attorney's fees after reducing claimed compensable hours by 35% and applying hourly rates to reflect prevailing

rates in Salt Lake City rather than New York City as urged by plaintiffs. The Tenth Circuit did not disturb these determinations, so the lodestar as calculated by the district court remains at $293,741.55.

II.

REDUCTION OF LODESTAR FOR LIMITED SUCCESS

The trail court reduced the lodestar by seventy-five percent to reflect limited success because of failure to prevail on most of the claims which were presented, and unsuccessful presentation of alternative theories to invalidate Utah's so-called abortion ban. Jane L. et al. v. Bangerter (Jane L. IV), 828 F.Supp. 1544 (1993). The Tenth Circuit reversed most of this court's substantive determinations and rejected this court's ruling that attorney's fees should not be awarded for presentation of the five unsuccessful alternative theories because they were separate and distinct from the core issue of alleged unconstitutionality of the Utah statute under the due process clause. Jane L., et al., v. Bangerter, 61 F.3d 1505 (10th Cir. 1995).

A. Relative Importance of Claims

The Tenth Circuit has instructed this court to reassess the degree of plaintiffs' success in light of the appellate court's merits determinations, and to make a qualitative assessment regarding the relative importance of one claim versus another. The Tenth Circuit panel regarded the prior reductions by this court as presenting a suspiciously "coincidental correlation between the ratio of successful and unsuccessful claims," and was concerned that this court "may

have mechanically weighed each successful and unsuccessful claim equally."[1]

Based upon a review of the very large and extensive written and oral presentations made to this court in what was protracted and massive litigation, the claims asserted were evaluated and assessed in relative percentages by this court and are now reiterated as follows:

Unconstitutionality of abortions under Utah Statute - 50%

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[1] Plaintiffs advanced eight claims, only two of which were granted by this court. The Circuit Court described these claims as follows:

> Plaintiffs succeeded in invalidating the pre-20 week restrictions on abortions (Utah Code Ann. § 76-7-302(2)) and the spousal notification statute (Utah Code Ann. § 76-7-304(2)). They were unsuccessful below on the following claims: 1) the post-20 week abortion restrictions in Utah Code Ann. § 76-7-302(3); 2) the choice of method provisions in Utah Code Ann. §§ 76-7-307 and 308; 3) the serious medical emergency provision in Utah Code Ann. § 76-7-315; 4) the criminalization provision in Utah Code Ann. § 76-7-314; 5) the alternative legal theories advanced to maintain the underlying right to an abortion; and 6) the state constitutional claims. Jane L. v. Bangerter (Jane L. IV), 61 F.3d at 1511 Fn. 2 (1995).

1. Pre-viable (before 20 weeks) abortions on demand - under due process clause - 17.5%

2. Post-viable (after 20 weeks) abortions - under due process clause - 17.5%

3. Alternative constitutional theories to invalidate Utah statute - 15%

- Equal protection
- Establishment clause
- Free exercise clause
- Freedom of speech
- Involuntary servitude

Other claims - 50%

4. Spousal notification - 8%

5. Fetal experimentation - 9%

6. Choice of methods - 8%

7. Serious medical emergency including incorporation of statute requiring mens rea to invalidate criminal intent - 15%

8. Utah Constitutional claims - 10%

The primary attack on Utah's abortion laws was to invalidate statutory restrictions on pre-viable as well as post-viable abortions. A large part of the legal work and presentation focused on theories other than a woman's liberty interest under the due process of law clause as ruled upon in

Roe v. Wade. Both sides recognized that an imminent ruling by the Supreme Court in Casey likely would be definitive as to pre-viable abortions on demand. Accordingly, much of the effort was focused on the statutory restrictions imposed upon post-20 week abortions. Also, a great deal of emphasis was placed on other possible grounds and theories for invalidating the Utah statute. These challenges by plaintiffs taken together represented about 50% of the total legal matters presented to the court, both in importance and volume. In allocating percentages to the component parts of these challenges - which includes time spent, emphasis placed, briefing and oral argument - this court regarded plaintiffs' success as to the pre-20 week abortion challenge as 17.5%, the unsuccessful challenge of restrictions upon post-20 week abortions as 17.5%, and the unsuccessful alternative theories which were extensively briefed and argued as 15%. On appeal, the success ratio of plaintiffs as to the aforesaid abortion restriction challenges rose from 17.5% to 50%.

The other issues presented challenges which also amounted to approximately 50% in the qualitative assessment analysis. The "serious medical emergency" issue not only involved a vagueness challenge, but also directly implicated a separate Utah statute which required mens rea in the assessment of possible criminal liability. These matters together were and are evaluated at 15%. Spousal notification, fetal experimentation and choice of methods involved about the same emphasis and relative significance, and each of these issues was assigned approximately 8% of relative importance. The challenges based upon state constitutional claims were assigned 10%. All of these matters netted plaintiffs only about 8% success, which reflected the lower court's favorable ruling on spousal notification and rejection of the other claims. On appeal, two additional issues were ruled as

successful by the Tenth Circuit - choice of methods and fetal experimentation - which increased plaintiffs' percentage of success to 25% as to the aforesaid issues.

B. Reassessment of Level of Success

Based on this court's previous analysis, the aggregate of the aforesaid qualitative assessments resulted in only a 25% success ratio in favor of plaintiffs. Based upon the Tenth Circuit's determinations, the success ratio is raised to 75%. The level of success of plaintiffs in this litigation is therefore adjusted accordingly, reducing the lodestar by only 25%, which results in a legal fee award to plaintiffs of $220,306.

III

LEGAL FEES AWARDED TO DEFENDANTS

This court awarded fees to defendants in two particulars. First, for what this court perceived to be the presentation of frivolous claims, i.e., that the Utah abortion statute violated provisions of the United States Constitution concerning involuntary servitude, equal protection of the laws and the Establishment Clause. Second, for assertion of state constitutional claims which were brought in bad faith. This court awarded defendants the sum of $29,879.63 as to the claims found to be frivolous, and the sum of $15,847.47 to be paid by plaintiffs' counsel as to the claims which the court found to have been brought in bad faith. The Tenth Circuit reversed in toto the district court's award of attorney's fees to defendants, finding that this court had abused its discretion by awarding defendants any attorney's fees and expenses. The Tenth Circuit panel apparently did not reach or feel

constrained to even discuss this court's finding that the state constitutional claims had been brought in bad faith.

IV

COSTS AND EXPENSES

Plaintiffs lumped costs and expenses together in a submission requesting recovery of $51,775.56. After separation out of expenses (which are more appropriately considered as part of attorney's fees), this court identified $13,009.19 in costs. Those cost items were denied since they "washed" with an approximately equal amount awarded to defendants as prevailing parties on most of the claims. This court now eliminates the award of costs to defendants and reduces the costs awarded to plaintiffs by 25%, consistent with the re-computed percentage reduction of attorney's fees. Accordingly, plaintiffs are awarded $9,756.29 in costs.

Expenses claimed by plaintiffs amounted to $38,766.37. This court denied claimed travel expenses in the amount of $22,709.57, and the Tenth Circuit said that it was "not persuaded that the district court abused its discretion" in that particular. Accordingly, this court awards plaintiffs the sum of $16,068.68 in expenses to be added to the award of attorney's fees. The award to defendants of expenses is vacated.

Based upon the foregoing, it is hereby

ORDERED, that plaintiffs, whose claims were successfully prosecuted, are awarded $236,374.68 for attorney's fees; it is

FURTHER ORDERED, that plaintiffs are awarded $9,756.89 for costs of court; it is

FURTHER ORDERED, that previous awards to defendants of attorney's fees, expenses and costs are vacated.

IT IS SO ORDERED.

DATED: January 5th, 1996.

J. THOMAS GREENE
UNITED STATES DISTRICT JUDGE

Dissent, Greene, J.

In writing this dissent, there is certainly no intention to rehash or to request reconsideration of the rulings by the Tenth Circuit concerning previous rulings by this court. This court has endeavored faithfully to follow the directives issued on remand. In reassessing attorney's fees, however, this court respectfully disagrees in at least two particulars with the required awards to be made in furtherance of the rulings of the Honorable Tenth Circuit.

Attorneys Fees Awardable as a Result of Non-Severability of Utah Statutory Restrictions on Post-Viable Non-Therapeutic Abortions

With the exception of determining the constitutionality of pre-viable abortions on demand, perhaps the most significant and important issue presented (in this

court's opinion) was the constitutionality of restrictions imposed by the Utah statute upon post-viable (post-20 week) abortions. The higher court did not reach or rule upon this important issue on the merits. In Planned Parenthood v. Casey, 112 S.Ct. 2791, 2817, 120 L.Ed.2d. 674 (1992), the Supreme Court rejected the trimester framework of Roe v. Wade, and fixed the point of viability as the appropriate line of demarcation wherein the interest of the State in unborn children exceeds the liability interest of a woman in the abortion choice. Whether the Utah statute imposes an undue burden on the choice to obtain a late (post-20 week) non-therapeutic abortion is the hard but crucial decision which should determine in largest part success or lack of success as to this issue. That determination was not made by the appellate court.

The Tenth Circuit disposed of the issue in a tenuous interpretation of the Utah Legislature's separability clause, striking down the post-20 week section of the statute as not severable. The higher court made it clear that this court erred in giving effect to the explicit language of that severability clause. In this regard the appellate court was able to determine that the Utah Legislature's "overarching substantive intention" was "to ban abortions throughout pregnancy." The Tenth Circuit ruled that Utah's restrictions on post-20 week abortions constituted "an integral, unseverable analog" to the ban on pre-viable abortions, and that invalidation of the latter required invalidation of the former. However, when confronted with Utah's statute concerning the "serious medical emergencies exception," the higher court rejected plaintiffs' contention that this provision is not severable from the invalidated sections of Utah's abortion statutes. The Tenth Circuit ruled that notwithstanding specific reference to the invalidated sections

in the "serious medical emergency" section, that section "can stand without violating legislative intent" because other portions of the abortion laws remain valid and "continue to impose requirements that in the face of a medical emergency, could be quite costly and cumbersome." For substantially the same reasons, the appellate court ruled that the medical emergency provision was severable, should the post-20 week provision also have been severed?

Notwithstanding the appellate ruling that the section in question is not severable, and accepting that ruling as this court must as the law of this case, this judge would not have regarded such as representing a full "win" in the absence of the Tenth Circuit directive concerning assessment of fees.[2] This court would have reassessed the level of success as less than the full measure of heightened success as to that issue. Absent a ruling favorable to plaintiffs on the important substantive issue - which was the main focus of briefing and argument as well as the trial court's opinion on the subject - it is the opinion of this court that the level of success should be fixed at no more than one half - i.e., 8.75% rather than the full 17.5% which this court assigned to that issue in the qualitative assessment analysis.

For the reasons aforesaid, this judge respectfully dissents from the required award of the full measure of increased attorney's fees concerning plaintiffs' success in

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[2] The Circuit Court regarded its non severability ruling concerning post 20-week abortions as a wholly successful result for plaintiffs and directed this court to "reassess the wins and losses" as to which "plaintiffs have now prevailed." Jane L. v. Bangerter, 61 F.3d at 1513.

invalidating the post-20 week abortion provision.

Attorney's Fees Awardable to Defendants

Plaintiffs alleged and submitted to this court for determination, several claims attacking the Utah abortion statute under the Utah Constitution. Utah acceded to the jurisdiction of this court in that neither the Governor nor the Attorney General of Utah as parties objected or claimed the right of dismissal on jurisdictional grounds. At a late stage in the proceeding, plaintiffs sought to withdraw the claims by dismissal without prejudice, which was opposed by defendants. Plaintiffs then argued that the claims ought to be dismissed anyway because of lack of jurisdiction in this court since the state's consent to jurisdiction of the federal court was insufficient under Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). It appeared to this court not only that the state's unqualified consent to having the matter presented for decision in federal court rather than state court removed any impediment to jurisdiction, but that the claim was presented by plaintiffs as a ploy in view of involvement of plaintiffs' counsel in a previous analogous case, Hodgson v. Minnesota, 1985 W.L. 6547 (D. Minn. Jan. 23, 1985), in which case the State of Minnesota successfully moved for dismissal of state constitutional claims based upon Pennhurst. It further appeared to this court that counsel for plaintiffs believed from the outset but failed to so advise the court that there was a good argument that this court lacked jurisdiction of the state claims. So, depending on how it appeared to counsel, this court finally might rule, the claim of no jurisdiction could be raised as a "trump" and the state claims could be presented as needs be for further challenge at a later date in state court. This court rejected counsel's jurisdictional arguments, finding

that the state had waived Eleventh Amendment immunity, and proceeded to address the state claims on the merits. Further, this court found that the state claims were brought in bad faith, justifying an award of attorney's fees in favor of defendants under the inherent power of the court (Chambers v. NASCO, Inc., 501 U.S. 32 111 S.Ct. 2123 (1991)) and pursuant to 28 U.S.C. § 1927. See Jane L. v. Bangerter (Jane L. IV), 828 F.Supp. at 1554, 1556.

Since this court essentially ruled that the state constitutional claims which corresponded to federal claims were frivolous, the Tenth Circuit's view that this court was in error in that regard might explain why the higher court directed reversal of any award of attorney's fees to defendants. The higher court did not specifically address the award of attorney's fees based on presentation of claims in bad faith.

For the reasons aforesaid, this judge respectfully dissents from the blanket directive not to award any attorney's fees to defendants, which required reversal even of the award based upon presentation of claims in bad faith.

ABORTION LIMITATION RESOLUTION
H.J.R. No. 39
Passed February 21, 1990

By Evan L. Olsen
Jeril B. Wilson
R. Mont Evans
J. Reese Hunter
Stephen M. Bodily
Melvin R. Brown
Larry V. Lunt

A JOINT RESOLUTION OF THE LEGISLATURE SETTING FORTH UTAH'S POSITION ON ABORTION AND THE REGULATION OF ABORTION; PROVIDING FOR SPECIFIED SUPPORT OF STATES PURSUING ACTIONS BASED ON LEGISLATION THAT RESTRICTS ABORTIONS; AND DIRECTING A STUDY OF THE ISSUE.

Be it resolved by the Legislature of the state of Utah:

WHEREAS the policy and position of the Legislature is to favor childbirth over abortion, and that abortion be regulated by the state of Utah as permitted by the United States Constitution;

WHEREAS the Legislature finds that the lives of human beings are to be recognized and protected, regardless of their degree of biological development;

WHEREAS Utah has a compelling state interest in the life of the unborn child throughout pregnancy;

WHEREAS the abortion rate has continued to increase in Utah from 2,146 in 1975 to 4,837 in 1988;

WHEREAS this alarming increase in the abortion rate indicates a corresponding increase in the number of unwanted pregnancies;

WHEREAS family planning programs have been unsuccessful in attempts to reduce unwanted pregnancies;

WHEREAS the reduction in unwanted births in the nation have been a result of increased abortions rather than decreased pregnancies;

WHEREAS abortion has become increasingly used as a form of birth control;

WHEREAS the Legislature finds that abortion is not a legitimate or appropriate method of birth control;

WHEREAS it is the policy of the Legislature that, if an abortion is granted, it should be only under very limited circumstances, including danger to the life or physical health of the mother, pregnancies resulting from rape or incest, and in cases of severe deformity of the unborn child;

WHEREAS the United States Supreme Court, in Webster v. Reproductive Health Services, No. 88-605 (1989), has given the states more flexibility in determining their abortion policies;

WHEREAS the Legislature desires to support those states whose laws reflect these same values, by filing an amicus curiae brief with the United States Supreme Court, evidencing Utah's support of the unborn child's right to life;

and

WHEREAS the Legislature desires to study the issue of abortion to determine what circumstances justify its use:

NOW, THEREFORE, BE IT RESOLVED that the Legislature of the state of Utah recognize that Utah has a compelling state interest in limiting abortion to situations where the life or physical health of the mother is endangered, where pregnancy is the result of rape or incest, or when there is severe deformity of the unborn child.

BE IT FURTHER RESOLVED that the Office of Legislative Research and General Counsel, in consultation with the Legislative Management Committee, be directed to choose a state or states that are pursuing or defending statutes that promote the values set forth in this resolution, and file an amicus curiae brief with the United States Supreme Court supporting that state's or those states' actions.

BE IT FURTHER RESOLVED that the Legislature refer the issue of abortion to a 14-member task force, five senators appointed by the president of the Senate and nine representatives appointed by the speaker of the House, to take testimony and examine the ramifications of limiting abortions; that salaries and expenses of legislators shall be paid in accordance with Section 36-6-2; that the task force shall be staffed by the Office of Legislative Research and General Counsel; that the task force conclude its study on or before December 1, 1990; and that the task force be dissolved as of that date.